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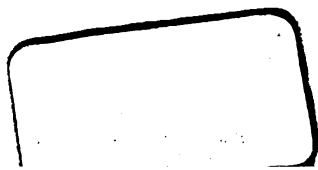
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IRISH EQUITY REPORTS

PARTICULARLY OF

POINTS OF PRACTICE,

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY,

THE

ROLLS COURT,

AND THE

EQUITY EXCHEQUER,

From Michaelmas 1839, to Trinity 1840, inclusive,

In the Third and Fourth Years of the Reign of Queen Victoria.

Chancery:

By CHARLES HAIG, Esq.

Rolls:

By WILLIAM BEAUCHAMP STOKER, Esq.

Equity Exchequer:

By ROSS S. MOORE, Esq.

BARRISTERS-AT-LAW.

VOL. II.

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1840.

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NOTE.

CHANCERY.

The Cases of Trinity Term have been reported by RICKARD DEASY, Esq.

EQUITY EXCHEQUER.

The Cases of the same Term by FRANCIS BRADY, Esq.

JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THESE REPORTS.

HIGH COURT OF CHANCERY.

Lord High Chancellor.—LORD PLUNKET.

Master of the Rolls.—SIR MICHAEL O'LOGHLEN.

COURT OF EXCHEQUER.

Chief Baron.—The Right Honorable STEPHEN WOULFE.

Second Baron.—The Honorable RICHARD PENNEFATHER.

Third Baron.—The Honorable JOHN LESLIE FOSTER.

Fourth Baron.—The Right Honorable JOHN RICHARDS.

ATTORNEY GENERAL.

The Right Honorable MAZIERE BRADY.

SOLICITOR GENERAL.

DAVID ROBERT PIGOT, Esq.

SERGEANTS.

First Sergeant.—RICHARD WILSON GREENE, Esq.

Second Sergeant.—JOSEPH DEVONSHER JACKSON, Esq.

Third Sergeants.—WILLIAM CURRY, Esq.

RICHARD MOORE, Esq.

MEMORANDUM.

On the 22d of July last, the Right Honorable STEPHEN WOULFE, Lord Chief Baron, died at Baden-Baden; in consequence of which the following appointments took place:—The Right Honorable MAZIERE BRADY, her Majesty's Attorney-General, to be Lord Chief Baron; DAVID R. PIGOT, Esq., her Majesty's Solicitor-General, to be Attorney-General; RICHARD MOORE, Esq., her Majesty's Third Sergeant, to be Solicitor-General; and JOSEPH STOCK, Esq., LL.D., to be her Majesty's Third Sergeant.

On the 23d of May last, WILLIAM CURRY, Esq., her Majesty's Third Sergeant-at-Law, was appointed Master in Chancery, in the room of RODERICK CONNOR, Esq., who died a short time previously; and RICHARD MOORE, Esq. was at the same time appointed her Majesty's Third Sergeant-at-Law.

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CORRIGENDA.

Page 155, at line 8th from bottom, the *punctuation* should be, ' Under the New Rule the petitioner may have had this balance invested as of course. If he should think proper to make a special application for the purpose, I will not,' &c.

Page 226, at line 18th from top, *for* 'affects' read 'defects.'

Page 238, at line 23d from top, *for* 'argument' read 'agreement.'

Page 378, note, *for* 'allowed to the Exchequer Reports,' read 'allotted to the Exchequer Reports.'

Page 451, at line 25th from top, *for* 'rent' read 'debt.'

CASES

IN THE

COURTS OF CHANCERY, ROLLS, AND EQUITY EXCHEQUER.

CHANCERY.

Tuesday, June 18th, 1839.

CLIENT AND SOLICITOR—VALIDITY OF SECURITIES TAKEN FROM
CLIENT—EFFECT OF ACCOUNT STATED AND SETTLED BETWEEN
CLIENT AND SOLICITOR—COSTS—ASSIGNEE OF JUDGMENT IN
TRUST—GENERAL PAYMENTS, IN ACCOUNT.

D'ARCY v. BURKE.

THE bill in this cause was filed in 1830, for the purpose of restraining the defendant from proceeding on foot of a judgment on bond of 19th April, 1823, for the penal sum of £992. 17s. 4d., late currency, and for an account of the dealings on foot of which that bond was obtained; and the bill prayed that this bond and judgment should stand only for so much as should on such account appear to have been actually due.

It appeared that the plaintiff was left a minor of 15 years of age, on the death of his father, in 1815; that his mother had contracted a second marriage, in 1816, with one M'Auley, and had entered into possession of the estates and effects of her late husband, under a pretended title as

On bill filed by client against solicitor, to set aside a bond and judgment for the amount of an account stated and settled between solicitor and client, after the client had come of age (where the solicitor has also acted as agent

and general manager of the estate and interests of the client during his minority) the Court refused to open the account on the allegations that the greater portion of it consisted of charges for costs, and other items, for which the client was not properly liable, and that the costs were not taxed, and that the account did not contain credits to a large amount to which the client afterwards discovered he was entitled.

On bill filed by client against solicitor, to open an account stated and settled some years before, the Court, after a decretal order dismissing the bill as to opening the account stated and settled, and directing an account of subsequent dealings only, will not, on further directions, go into an item overcharged and suppressed in the account stated and settled, no sufficient grounds for doing so having been shewn at the original hearing.

Costs of assigning a judgment to a trustee of the conuzee, for family purposes, to which assignment the conuzor was not a party, are not chargeable against the conuzor; and *semble*, that the costs in the cause of such trustee, who is assignee of a judgment, and brought before the Court as a necessary party in a suit instituted by the conuzor to set aside the judgment, are only chargeable against his *cestui que trust*, and not against the plaintiff in the cause.

A solicitor transacting business for his client, and having, at the same time, a judgment against him bearing interest, the client having made general payments from time to time, the solicitor was held justified in applying those payments to his account for costs accruing due, although the interest on the judgment against his client was accumulating at the same time.

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heir-at-law to her father, from whom the said estate was derived. The real estates were of considerable value, amounting to about £700 a-year.

The defendant had been the solicitor and confidential law agent of the plaintiff's father in his lifetime, and had claims, in right as well of his own father, who had previously been the confidential law agent, as of himself.

He instituted proceedings against M'Auley and wife, on his own account, for the recovery of these demands, consisting chiefly of bills of costs; he also commenced proceedings by ejectment, on behalf of the minor, for the recovery of the estates to which the latter was entitled, and became, in other respects, the general manager of the plaintiff's affairs. The proceedings in the ejectment cause were terminated by compromise, on the condition that M'Auley and wife should not be held liable for mesne rates, that an annuity of £200 a-year should be secured to Mrs. M'Auley for her life, and £100 a-year for M'Auley, in case he survived her, and that the plaintiff, the minor, should be held liable for the whole of the said claims of the defendant, on foot of costs and otherwise. Part of the arrangement was, that defendant should hold possession of the lands subject to this annuity, and for the payment of his own debts, until the plaintiff should come of age, and should re-deliver possession to M'Auley and wife, if the plaintiff should then refuse to ratify the terms of the compromise, and thus to place the parties in the same relative position as before the compromise. This compromise was made in the year 1820.

In 1822, plaintiff attained his age. In the mean time, and up to a settlement of accounts in April, 1823, the defendant continued in receipt of the rents of the several estates of the plaintiff, and made disbursements to M'Auley and wife on foot of the annuity, and for the support of the plaintiff, and several of his brothers and sisters, who were also minors.

In April, 1823, he furnished an account to the plaintiff, purporting to be on foot of all the dealings between them up to that date, by which it appeared that the plaintiff was indebted to him in the sum of £992. 17s. 4d., for which he required a security to be executed. This demand consisted of about £660 for costs incurred by plaintiff's father, deceased, and by M'Auley and wife, and the remainder for costs incurred by plaintiff himself between the year 1816 and the time of such settlement. The bond in question was accordingly passed to the defendant, and judgment entered thereon for the entire sum.

Throughout this transaction, the plaintiff had no other solicitor or law agent, and the defendant continued to act for him in these capacities up to the year 1829. During that period, certain costs at law and in equity were incurred by the plaintiff to the defendant, and between the 19th April, 1823, and 29th September, 1825, certain payments, amounting to £112. 14s. 8d., were made by the plaintiff to the defendant,

generally upon account. On the 1st May, 1827, a further sum of £130 was likewise paid generally upon account.

In the year 1828, the defendant, being indebted by bond and judgment, to one Columbus M. O'Flanagan, who threatened to sue him, applied to the plaintiff to pay or secure to O'Flanagan the sum of £300 for his accommodation, and agreed to allow the said payment in discharge of the costs which had accrued due subsequent to the year 1823, which costs had not then been furnished or ascertained. The plaintiff accordingly secured this sum to O'Flanagan, and subsequently paid the amount.

It appeared that the origin of this debt of the defendant to O'Flanagan, according to the statement of the defendant in his answer, was as follows:—That a Mrs. Dowell, the sister of O'Flanagan, was a tenant to certain lands, the property of the plaintiff, and being in arrear of rent in the year 1819, an ejectment was brought by M'Auley and wife (then in possession) on foot thereof. O'Flanagan, then acting as her agent, entered into a compromise with M'Auley and wife; but the defendant (then acting for the present plaintiff) having learned the transaction, apprised O'Flanagan of the rights of his client, the minor: whereupon the compromise with M'Auley and wife was broken off. The defendant then entered into a dealing with O'Flanagan on behalf of the plaintiff, and agreed that the plaintiff should, when of age, execute a lease of the lands in question at a certain rent then fixed on, on the condition of being immediately paid £300, the amount of rent then ascertained to be due. O'Flanagan paid the defendant this sum accordingly, and received the defendant's note as a security for the execution of the lease by plaintiff. Subsequently, desiring a better security, O'Flanagan required and obtained the defendant's bond for £300. This lease was never executed; O'Flanagan never sought to have it executed, having ceased to act as agent for his sister, Mrs. Dowell, in the mean time; but he proceeded against the defendant for the amount of the bond in the year 1828. The defendant then prepared a bill for an injunction to restrain O'Flanagan's proceedings, and stating the transaction between them; but the bill was not filed, and a compromise was entered into, by which O'Flanagan agreed to receive the principal sum of £300 in discharge of his claim. It was for the payment or security of this £300 that the defendant made the before-mentioned application to the plaintiff.

It did not appear that the plaintiff was made acquainted at this period with the nature of the transaction or the origin of the debt to O'Flanagan, or that he had any knowledge of the receipt by the defendant of the sum of £300 for rent in 1819. The defendant had appropriated this sum to his own use, and had never brought it into account or given credit for it in the settlement of accounts in 1823.

In 1830, proceedings having been instituted, at law, by the defendant on foot of the bond and judgment of 1823, the present bill was filed by

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the plaintiff, seeking the account as above stated. It did not appear that the receipt of the sum of £300, and its omission in the accounts, had been brought under the notice of the Court at the original hearing in June, 1837, as falsifying the accounts of 1823, and the bill was then dismissed without costs, so far as it sought to open those accounts and to set aside the bond and judgment then obtained to secure the amount appearing due. An account was directed to be taken on foot of this judgment, and the defendant's costs incurred subsequent to 1823 were ordered to be taxed. Against these costs, the sum paid by the plaintiff to O'Flanagan in 1828, for the use of the defendant, was directed to be set off, and a balance to be struck.

These costs, on taxation, were found to amount only to the sum of £277. 4s. 1d.

The Master's report found the sum of £1,355, for principal, interest, and costs due to the plaintiff on foot of the judgment of 1823, after giving him credit thereout for the balance appearing in his favor on foot of the payments made to and for the use of the defendant in the interval between 1823 and 1828, and which were set off, pursuant to the decree, against the costs incurred during the same period. To this report the plaintiff took four exceptions.

The first exception was general, to the effect, that the sum reported due as the result of the accounts directed should have been £318 instead of £1,355.

The second exception insisted that the Master should have given credit for the principal sum of £300 rent received in 1819, by the defendant, for the use of the plaintiff; and should also have reported it due, with interest, from the 1st July, 1819, when it was received, until the 19th April, 1823, when the accounts were settled in which it should have been included.

The third exception insisted that the costs of an assignment of the said judgment of 1823 to Matthew O'Connor, as trustee in a family settlement made by the defendant in 1824, and executed in order to indemnify the said O'Connor in respect of a sum of money of which he was trustee, and to which assignment the plaintiff was not a party, together with the costs of a revival of same in 1829, in the name of O'Connor, should not be allowed as against the plaintiff.

The fourth exception insisted that the Master had improperly set off the two general payments of £122. 14s. 8d, and £130, made between 1823 and 1827, against the costs which accrued due in the same interval, instead of deeming them appropriated to keep down the interest, and in discharge of the principal of the judgment of 1823.

Mr. *Blackburne*, Q.C., stated, that the first exception being general, as to the amount found due, should be allowed to the extent to which

the report should be varied, by the allowing of any of the subsequent exceptions; and then proceeded to state the second exception. This rested on the admission, in the defendant's answer, of the receipt of the £300 in 1819, under the circumstances set forth. Being money then actually due to the plaintiff, and paid to the defendant on his account, it should have been paid over at the time, or accounted for by the defendant, at all events, when settling with the plaintiff in 1819. It made no difference that the defendant had made himself liable to repay that money to O'Flanagan, and that it was repaid subsequently by the plaintiff, at his instance, for the plaintiff was ignorant of its having been received at all, and of his right to it, and the transaction being, besides, a most suspicious one, as far as the defendant was concerned, it was not equitable that the plaintiff should now sustain the loss of it.

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Mr. *Warren*, Q. C., for the defendant, objected, that the proper time for obtaining a decision on this point was at the original hearing. It was an afterthought, suggested in the office, and not sustained by any statement in the bill, or by the proofs in the cause, but rested solely on the defendant's answer, which shewed also that the defendant himself had reaped no advantage from the transaction, as he had to repay the money to O'Flanagan.

The COURT thought the question should have been raised at the original hearing, and overruled the exception.

Upon the third exception being stated, and the analogous cases of the assignees of insolvents or bankrupt parties brought before the Court, as in *Horan v. Woolaghan* (a) being referred to, the exception was allowed, so far as the costs of the assignees were concerned, and overruled as to the revivor, without debate.

4th Exception.—Mr. *Blackburne*, Q. C., and Mr. *Collins*, Q. C.—This raised the question as to the appropriation of general payments. It appeared that between 1823 and 1825, several small sums, amounting together to £112. 14s. 8d., were paid generally on account; and again, in 1827, a gross sum of £130 was paid by the plaintiff to the defendant, but without any specific application, either by demand or on payment, made by either party. During this period, interest was accumulating on the judgment of 1823, and costs of some proceedings, in law and equity, were incurred, so that there were two distinct liabilities, on the part of the plaintiff, existing at the same time. Under these circumstances, he sought to have the payments so made by him applied most for his own

(a) Beatty, 1.

June, 1839. *advantage.* In support of this principle, there was *Clayton's Case* (a), and *Brooke v. Enderby* (b).

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Mr. *Warren* and Mr. *Blake*, against the exception, contended that the onus of making the appropriation, which the Court was now asked to make, lay upon the plaintiff at the time of payment, had he then intended it. This he had not done, and it was the right of the defendant now to hold the payment made as he might choose to appropriate it. The plaintiff had that right at the time of payment, but not after, and the advances of costs in his business, necessarily required by the defendant from time to time, made it improbable that the payments were made upon foot of the other demands. As to the right of the creditor to make the appropriation, when none is made by the debtor, the cases were clear. *Hall v. Wood and wife* (c), *Peters v. Anderson* (d), and *Manning v. Western* (e).—[LORD CHANCELLOR. That is the received principle. Is there any thing in this case to take it out of the rule?]

Mr. *Close* replied for the plaintiff.—The cases most in point, relied on for the defendant, were cases at law, and did not, besides, carry the principle contended for further than the plaintiff was willing to concede. There was no question, that where there were several distinct debts subsisting at the same time, and general payments were made without any specific application of them to account of particular debts, the right to appropriate such payments, which was vested first in the debtor making them, devolved, by his neglect, upon the creditor receiving them. But, then, the creditor must make his election *at the time* of payment, and must also communicate such election, and the particular appropriation determined on, to the debtor. Where neither party had made such appropriation, then the Court had the power to make it—first, according to the presumed intention of the parties themselves at the time of payment, to be collected from the circumstances of the particular case; and second, where no sufficient evidence of this nature existed, then according to the equity of the case:—First, that the creditor must make his election at the time of payment, the note of Mr. *Hovenden* to the case of *Chase v. Box* (f), fairly summed up the authorities on the point. In *Bodenham v. Purchas* (g), there referred to, the Court, even at law, expressly declared, that the creditor must exercise the right of appropriation at the time of payment, and treated general payments, as made in discharge of the earlier items in the account in exoneration of the debtor. So, in the later case of *Simpson v. Ingham* (h), where Bayley, J.

(a) 1 Meriv. 512.

(b) 2 Brod. & Bing. 71.

(c) 14 East, 243.

(d) 5 Taunt. 596.

(e) 2 Vern. 606.

(f) 2 Freem. Ch. Ca. by Hov. (note) 262.

(g) 2 B. & Ald. 39; and see 2 Saund. R. (note b.) 415.

(h) 3 Dow. & Ry. 249, and 2 B. & C. 65.

declared, that where the exercise of the creditor's right is calculated to work injustice, the Court would not permit the appropriation sought to be made; and held that private entries, though made at the time, did not conclude the parties until they were communicated. Best, J. also held (referring to *Clayton's Case*), that the creditor should have a reasonable time to make his election, but having once made it, was bound by it. The decision of the Court, in that case, was in favor of the creditor, but the rule laid down applied to both parties. In an old case of *Brett v. Marsh* (a), the principle, that the debtor shall receive notice of the particular appropriation intended by the creditor, is also distinctly recognised; and in *Wentworth v. Manning* (b), the entries in a merchant's book (the creditor's) were held by the Lord Chancellor not to bind the debtor, contrary to the justice of the case. In *Smith v. Wigley* (c), so lately as 1833, Chief Justice Tindal expressly decided that the creditor must make the appropriation *at the time the money comes to his hands*, and desired to be understood as deciding the case before him upon the general rule laid down in *Clayton's Case*, in *Bodenham v. Purchas*, and *Simpson v. Ingham*. In the present case, no time was fixed at which the defendant had made the appropriation contended for, and his answer in the cause contained the first intimation made to the plaintiff of any intention to apply the general payment to account of his costs. But the answer itself negatived this pretended appropriation. It was admitted by the answer, that the payment of £300 made by the plaintiff to O'Flanagan in 1828, for the use of the defendant, was applied for and made expressly upon account of the costs which had accrued due between 1823 and that period. These costs had been first furnished and taxed under the decree in this cause in 1838, and were ascertained to amount to but £273. The general payments made in the same interval amounted to £243; so that but £30, or thereabouts, could have been due for costs in 1828, when so large a sum as £300 was demanded on foot of them, if the appropriation now pretended had been ever, in fact, made. It was plain that no such appropriation had been made, or that the £300 paid in 1828 should have been applied to the debt of 1823. The circumstances, on the contrary, raised the presumption, that the defendant himself, at that period, had not intended or made any such appropriation as he now alleged, and the Court would not now permit it. Where the intention of the parties could be collected from the circumstances, an appropriation contrary to it, though made at the time of payment, would not be sustained; *Shaw v. Pictou* (d); therefore, the Court here, acting on the admitted facts of the transaction of 1828, would at least hold that no intention was shewn to have existed, up to that period, to appropriate the general payments to the account of costs; and the payment of £300, then made, more than

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(a) 1 Vern. 468. (b) 2 Eq. Ca. Ab. 261. (c) 3 M. & Scott, 174.

(d) 4 B. & C. 715, and 7 Dow. & Ry. S. C. 207.

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liquidated the entire amount of the costs. Therefore, no specific appropriation having been made or communicated, and no evidence existing of any express intention so to appropriate, the case came within the general jurisdiction of the Court, to make such appropriation as was equitable under the circumstances. With very few exceptions, and those resting on the peculiar nature of the dealings between the parties in each case, the whole current of authorities, from the earliest period, goes to establish this principle, namely, that the Court will appropriate general payments most for the relief of the debtor. In the earliest case, *Heyward v. Lomax* (a), where money was due upon a mortgage bearing interest, and also upon an account not bearing interest, the Court held that a general payment should be taken to have been made on foot of the mortgage expressly, because it was natural to suppose that a man would rather elect to pay off the debt for which interest was to be paid. This was the rule of equity and common sense, and was acted on in many cases, both at law and in equity. In *Meggott v. Mills* (b), Chief Justice Holt held that a general payment should go to a particular debt, contracted in a capacity in which the debtor was liable to a commission of bankruptcy, instead of a debt contracted by him in a dealing not within the statutes of bankruptcy. Upon this principle of relieving the debtor were also the decisions in the cases of *Wentworth v. Manning* (c), and of *Chase v. Box* (d), above referred to. In what is called *Clayton's Case* (which was a branch of the important case of *Devaynes v. Noble*) (e), Sir W. Grant discussed the question, and reviewed the cases at great length in his judgment. It has been since considered a leading case on the subject. The principle decided, so far as the authority applied in the present case, was, that general payments, made on foot of a banking account, were to be applied to the earlier items, unless the creditor declared his intention otherwise *at the times of payment*; and this was done expressly in exoneration of the debtor. So, in *Birch v. Tebbutt* (f), *Brooke v. Enderby* (g), *Newmarsh v. Clay* (h), *Smith v. Wigley* (i), *Goddard v. Hodges* (k), *Dawe v. Holdsworth* (l), and in *Wright v. Laing* (m), which was an action of penalties on a usurious transaction; and the Court held, that there having been no appropriation of the general payments *at the time of payment*, the case would apply then to the legal and not the usurious contracts, though it subjected a party to penalties. Thus, even at law, the debtor had been relieved; and in equity, the same principle had been strictly followed. In *Pemberton v. Oakes* (n), Lord Lyndhurst expressly adopted the decisions in *Clayton's Case*, *Bo-*

(a) 1 Vern. 24.

(b) 1 Lord Raym. 286. Quere S. C. *Anon.* Comberb. 463.

(c) 2 Eq. Ca. Ab. 261.

(d) 2 Freem. Ca. 2 ed. by Hovender, 261.

(e) 1 Meriv. 572.

(f) 2 Stark. N. P. Ca. 74.

(g) 2 Brod. & B. 71.

(h) 14 East, 239.

(i) 3 Moore & Scott, 174.

(k) 1 Cr. & Mees, 33, and S. C. Tyres, 209.

(l) Peake's N. P. Ca. C4.

(m) 3 B. & C. 65.

(n) 4 Russ. R. 169.

denham v. Purchas, Simpson v. Ingham, and Brooke v. Enderby; so that the principle must be considered completely settled. Then, as to the facts in the present case, it should be recollected, first, that the judgment was bearing interest, which the accounts shewed these payments would have been sufficient to keep down; and second, that the costs, in liquidation of which it was alleged the payments were applied, were not such an ascertained subsisting demand or debt, as was contemplated by the rule relied on by the defendant. No clear sum, to which any given payment was applicable, was shewn to be due for costs at the time of making such payment; and the demand and payment of such a sum as £300, in 1828, expressly on foot of costs, amounting altogether to but £273, destroyed the pretence that the previous payments had been applied to account of these costs. Therefore, the facts before the Court fully warranted the application of the authorities relied on. The case, however, was still stronger, when the relation between the parties was considered. In the cases cited, the parties were generally merchants, bankers, or traders, familiar with transactions of this nature, and presumed to understand clearly the rule of such dealings; at all events, acting at arm's length, without undue control or confidence, and under circumstances which commonly enforce caution. Here, the very reverse was the fact. The defendant had thrust himself into the management of the plaintiff's concerns, not merely as attorney or solicitor, but as a general agent and manager, during the plaintiff's minority, and under circumstances that gave him undue power over his client. The transaction of 1819, with O'Flanagan, shewed how improvidently, not to say unfairly and illegally, he had acted in this trust. If that transaction were now held closed by the Court, the plaintiff was a loser of £300, which should have been brought to his credit, with interest, in 1823. The security then taken from him for a debt, with two-thirds of which he was not legally chargeable, was that upon foot of which it was now sought to have the advantage of these payments. During the whole period of these payments, the confidential relation of solicitor and client subsisted between the defendant and him. It was the duty of the defendant so to have conducted his dealings with his client, as should be most for the interests of the client. It was also his duty to advise his client against himself, as if acting for his client with a third person. *Gibson v. Jeyes (a)*. Would his advice have been just or judicious, had he advised that these general payments should be applied to costs which were but accruing due slowly, from time to time, instead of keeping down the interest of the judgment? It is not to be credited, that if the plaintiff had been acting warily, or under honest advice, he would have permitted any such appropriation; and the Courts will not tolerate that a solicitor, or any party holding a confidential relation of the like nature, shall abuse his client's confidence to his own profit. On the contrary, the rule is express, that all accounts upon foot of dealings between them shall be

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taken most against the solicitor or agent, and that they shall be restrained from dealing with them upon the same footing as other parties. *Newman v. Payne* (a), *Crossley v. Parker* (b), *White v. Lincoln* (c), *Revett v. Harvey* (d), and in *Lewes v. Morgan* (e), a case for forty years before the Court in England, Lord Eldon in terms declared, that an attorney, acting both for himself and his client, should be bound to shew that he acted as well for his client as he did for himself (f). Therefore, upon these authorities alone, the plaintiff here was entitled to have these payments appropriated as he sought by the exception.

The LORD CHANCELLOR said it was unnecessary to dwell on this point of the case, especially if the other arguments were well founded. The principle was established, that the Court would deal differently with transactions between solicitors and their clients, from its rule towards other parties. Upon the other points, the argument was very forcible, and required consideration. His Lordship then recapitulated the leading points urged by Mr. *Close*, and stated that he would read the papers in the case, and confer with the Master.

Monday June 24th.

Upon this day, the LORD CHANCELLOR said—The fourth exception in this case must be overruled. I have spoken to Master Connor on the subject, and I think there is no ground for making the appropriation desired. I think the rule to be gathered from the cases is, that if no specification be made by the debtor when he pays, he cannot afterwards make it. If he does not make a distinct appropriation at the time, the right is lost to him, and he is not entitled to come at any period of time afterwards to make it. Now, here there were distinct transactions as to the bond and judgment, and the business which was doing from day to day, and for which money was paying from day to day. The natural application of money paid generally, while a solicitor is doing business, is to discharge those costs which are thus incurred, and pay him for his work and labour. But in this case I find, besides, that in the discharge which D'Arcy filed in the office, he states that the sum claimed on foot of costs cannot be due, because he had paid sums from time to time on account of them. These sums now in dispute were the only sums paid; therefore, I must overrule that exception. One exception is to be allowed in part—it is the third. It is to be allowed as to the costs of the assignment to O'Connor, but overruled as to the costs of the revivor had in his name. That is a matter which can be corrected without sending the case back to the Master.

The rule on the third exception also governed the first, which should be allowed in part also, to the extent to which the gross sum reported due was reduced, by the amount of these costs of the assignment being deducted.

(a) 2 Ves. jun. 199.

(c) 8 Ves. 363.

(e) 3 Austr. 769; and S. C. 4 Dow. P. C. 29; 5 Price, 42, and 3 Y. & J. 230.

(b) 1 J. & W. 460.

(d) 1 Sim. & Stu.

(f) 4 Dow. P. C. 46.

Tuesday November 5th.

EXECUTOR'S COSTS—EVIDENCE—HUSBAND AND WIFE

HARWOOD and BALL v. BLAND.

THIS cause came on to be heard on report unexcepted to, and merits.

MR. *Warren* Q. C., with whom was Mr. *T. B. C. Smith*, Q. C., on the part of the plaintiffs, stated that the bill was filed by the plaintiffs, as creditors of J. W. Barlow, deceased, against the defendant, his executor, upon which the usual decree to account was pronounced. The plaintiff Ball, by his bill, and before the Master, claimed as a specialty creditor, under a deed of partnership executed between him, the plaintiff Ball, and the testator Barlow, in respect of certain defaults found by the report, from which, also, it appeared that the estate would be insufficient to pay all the debts. The report further found that the defendant claimed to retain, as executor, in respect of a sum found due to him, in priority to the simple contract creditors of his testator.

Mr. *Warren* stated, that one of the points for consideration was, whether the executor was entitled to his costs: and submitted, inasmuch as the fund was insufficient to pay the debts, or perhaps the specialty debts, that the defendant, the executor, would not be entitled to his costs in priority to the plaintiffs' costs, but according to the priority given him by his retainer, claimed and reported according to the rule of Court.

Mr. *Brewster*, Q. C., and Mr. *B. C. Lloyd*, for the defendant, submitted that the defendant was entitled to his costs out of the fund. There was no complaint as to the conduct of the executor, but, on the contrary, it was admitted that the fund had been properly administered.

The point was not further pressed by counsel for plaintiffs.

The LORD CHANCELLOR decreed the plaintiff Ball to be entitled as a specialty creditor, and the defendant entitled to his retainer, and that the costs of both plaintiffs and defendant should be paid in the first instance, saying, that the rule referred to by plaintiffs' counsel did not apply to

In a creditor's suit, for the administration of assets, the executor of the deceased is entitled to his costs, although the estate prove insufficient to pay the debts. The rule of costs, according to priorities, does apply to such a case.*

A wife is an admissible witness against the personal representative of her deceased husband to charge his assets.

* The general rule is, that executors and administrators, like other trustees, fairly conducting themselves, are entitled to their costs. *Landon v. Greene*, *Barnard*. Ch. 390. *Beames on Costs*, 77, 166. In *Flanagan v. Nolan*, 1 Mol. 84, although an executor was charged with interest, having retained balances, yet he was allowed to retain his costs, his accounts not having been falsified. If,

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the case where a personal representative was brought before the Court, for the administration and protection of a fund which, without his exertion, might have been dissipated; so that, in this case, he would declare the defendant entitled to his costs, as well as the plaintiffs.

A question of evidence arose in this case, as to the admissibility of a declaration made by the testator to his wife. Sir Edward Borough, brother-in-law of the testator, preferred a claim before the Master against the estate of the testator, in respect of a bill of exchange, which he alleged was accepted by him for the accommodation of the testator, and paid by him, Sir Edward Borough, since testator's death. The evidence tendered in support of his claim was the admission of the testator to his wife, Sir Edward Borough's sister, that this accommodation bill was then in course, and was his (testator's) debt.

The Master, by his report, found the facts specially, and that if this evidence was admissible, then Sir Edward Borough was a creditor against the estate to the amount of the bill.

Against the claim of Sir Edward Borough it was submitted, that as the evidence of the wife would not have been admissible against the husband, if alive, it could not be admissible against his representative, to charge the assets. *Doker v. Hasler (a)*, before Best, C. J.

(a) R. & M. 198.

in a creditor's suit, it turns out that there are no assets applicable to the payment of the plaintiff's debt, the plaintiff will be ordered to pay costs. *Bluett v. Jessopp*, Jac. 240. An administrator does not lose his right of retainer by paying assets into Court, where the fund in Court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied. *Chisum v. Dewes*, 5 Russ. 29. An executor or trustee who retains a balance in his hands, and against whom a suit is instituted, will not be charged with the costs of the suit, except under circumstances of considerable misconduct. Where a suit is instituted with unnecessary haste against an executor or trustee who has not grossly misconducted himself, he will be allowed his costs. *Bennett v. Atkins*, 1

You. & Col. 247. Executor, though in the result made answerable for default, by reason of loss incurred through neglect, or chargeable with interest for retaining money in his hands, yet, if there is nothing beyond such negligence or retention of money, is still entitled to the costs of the suit. *Travers v. Townsend*, 1 Mol. 496. The administrator *ad litem* gets his costs, although no personal estate, but an executor volunteering to take out probate, must abide by the personal estate, and cannot get costs out of the real estate in default of personal assets. *Nash v. Dillon*, 1 Moll. 236. Executors' costs are the first charge on the personal assets, and then the plaintiff's costs in the cause, on a bill to administer, &c. When the suit has been fairly instituted, the old rule, that plaintiff's costs are to abide his priority, does not apply. *Bennett v. Going*, 1 Mol. 529.

Mr. *Webber*, for Sir Edward Borough, contended that Mrs. Barlow's evidence was admissible, and cited *Humphreys v. Boyce* (a), before Lord Tenterden, C. J.

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The LORD CHANCELLOR said, that without taking upon himself to decide between the two learned Judges, his own opinion being, that Mrs. Barlow's evidence was admissible, he would allow the credit claimed.

Reg. Lib. fol. 11, 5th Nov. 1839.

Let the report stand confirmed. Declare the evidence of Georgina Theodosia Barlow, as regards the testator John Wilson Barlow's liability to the bill of exchange for £660, admissible as evidence to charge the said J. W. Barlow's assets, &c.

Declare plaintiff and defendant entitled to their respective costs, in preference to the demand of any creditor. Declare the plaintiff Barlow entitled, as a specialty creditor of said testator, to the several sums which are found by the said report, &c.

(a) 1 M. & Rob. 140.

Saturday, November 9th.

REVERSAL OF DECREE—RE-PAYMENT OF COSTS LEVIED UNDER REVERSED DECREE.

MALONE v. O'CONNOR.*

THIS cause being set down to be heard on an order of the House of Lords, varying the order of this Court of the 19th February, 1838, the defendants gave notice, that at the hearing their counsel would move the Lord Chancellor for an order to compel Mr. Murdock Green, the plaintiff's solicitor, to refund a sum of £629 received by him under the order which had been varied by the Lords.

Costs paid under a decree or order, which is afterwards reversed on appeal, must be re-paid by the solicitor who received them to the person from whom they were received.

Mr. *Pennefather*, Q. C., for the motion.—The solicitor is the person who has received this money, and must now be taken to have received it in error. We seek the order against the solicitor, and not against his client, because the money was paid to the solicitor, and the client is a person incapable of paying it; in fact he is a pauper. The trustees in the defendant's marriage settlement were the parties to the issue which was directed by this Court. That issue was tried. We then applied for a new trial, and this Court, by order of February 1838,

* Reported Ll. & G. temp. Pl. 465. S. C. Maclean & Rob. 468.

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ordered us to pay the costs of the former trial, on giving us an order for a new trial, and also directed that the former verdict might be given in evidence, on the second trial. We appealed from that order. Notice of appeal was served, and an application was made to this Court to suspend the proceedings pending the appeal. That application was opposed by the plaintiff; and an affidavit by the plaintiff, and another by his solicitor, were filed for the purpose of opposing that motion, and it was refused, with costs. The plaintiff's solicitor then proceeded to enforce the former order, issued process, and served it on Mr. Ardill, who was obliged to pay about £629. The result of the proceedings in the Lords has been, that the part of the order relating to those costs has been reversed. There is now no order in existence to pay those costs. They cannot complain that they were acting under an order of the Court; they knew that order was the subject of appeal.—

[LORD CHANCELLOR.—Here you seek to have the order made against the solicitor. When the application was made to this Court to stay proceedings pending the appeal, this Court refused that order. This Court knew the pendency of the appeal, but the appeal stopping nothing, this Court said those costs should be paid. It was not the fault of the solicitor, but the fault of the Court. The Court is to see that no party shall suffer by its default. Can you fasten the default on the solicitor?]

Mr. *Pennefather*.—The rule certainly is, that no party is to suffer by the default of the Court; that is the ground on which we rely. Apply that rule to us. The Court must now take care that we do not suffer by its default. In *Muskerry v. Chinnery*, your Lordship made a decree, and the cause being brought on for a re-hearing before Sir Edward Sugden, he was pleased to disagree with your Lordship, and dismissed the bill with costs. Walsh, the solicitor for the Chinnerys, applied to Lord Muskerry for those costs. Lord Muskerry had not the money, and passed his bill for the amount. The parties finally appealed, and the order of Sir E. Sugden was reversed by the Lords, and your Lordship's order was affirmed. Then an application was made here, that the solicitor should return Lord Muskerry's bill, or refund the money. Walsh swore he had negotiated the bill, and the Court ordered him to return the money. That is a case precisely in point. The solicitor, being the person to whom the payment was made under the erroneous order, was held to be the person to refund.

Mr. *Blood, contra*.—The order here has not been reversed, but merely varied. It is true, that part which related to the costs in question has been varied, and those costs, instead of being ordered to be paid to us, are directed to be *reserved*. Therefore, at all events, they are only entitled to an order to compel Mr. Green to lodge the amount in

Court; but they are not entitled to go against Mr. Green, who is only solicitor in the cause, in the first instance. On the common rule with regard to sureties, they are bound to go first against the principal debtor: and if that be ineffectual, then against the surety. Here, they seek to go against the solicitor in the first instance, without first taking any step against his client.

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The Court was in default, but no party ought to suffer for that default. The Court made an order, which has been decided to be erroneous. On the authority of a case before Lord Hardwicke, which was long considered as authority, the Court directed that the verdict on the first trial might be given in evidence on the second. The authority of that case is now overturned, for it appears, on investigation, that Lord Hardwicke never, in fact, made the order attributed to him. The order of this Court, following that supposed decision, has now been reversed. The Court was in default, but the party who has paid the money pursuant to its order is not to be damnified. Whether the solicitor to whom the money has been paid is to lodge it in Court, or to pay it over at once, he ought, under the circumstances, to be allowed a reasonable time to do so. I am very anxious that, if possible, no party shall suffer through the default of the Court. It is a great hardship on the solicitor who acted under an authority of the order of the Court. If the Court could make it lighter upon him, it would be willing to do so. If the parties would be content to take a security for the amount, that might serve their purpose as well as the money.

The defendants' counsel intimated that they required the money in order to carry on the suit.

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The person who has received the money must repay it to the person from whom it was received. The order will be, that Mr. Green repay the money to the parties who paid it, within a month; and that he do also pay the costs of this application.

Saturday, November 9th.

EVIDENCE—ENTRIES IN BOOKS OF ROMAN CATHOLIC CHAPEL.

MALONE v. L'ESTRANGE.

Entry made in Chapel books, by Roman Catholic Clergyman, whose death and handwriting have been proved, is evidence of a marriage or baptism recorded thereby

THIS was a supplemental cause.* The bill was filed on the 25th day of June, 1838, for the purpose of bringing before the Court a tenant in tail, born after the commencement of the original suit. The original bill was filed by the plaintiff on the 11th day of August, 1836, for the purpose of having the trusts of the will of the late Right Honorable Anthony Malone declared and carried into execution, and praying that the plaintiff might be decreed entitled to an estate in tail male in certain estates, of which the testator died seised.

The *Solicitor General* stated the plaintiff's case.

Mr. *Blood* then called the plaintiff's proofs, and, for the purpose of proving the marriage of the plaintiff's father and mother, proposed to give in evidence the books of the Townsend-street and Wexford chapels, which contained entries of marriages and baptisms, and to read therefrom the entries respecting the marriage of the plaintiff's father and mother, and of the baptism of their children.

Mr. *Brewster*, Q. C., on behalf of the minor defendant, L'Estrange, objected to the admissibility of these entries, as not being legal evidence, contending that they were entries not kept under any legal obligation, or any authority recognised by law.

Mr. *Sergeant Greene*, for the plaintiff.—The principle upon which these books are given in evidence, and are admissible, is, that they contain contemporaneous entries made by deceased persons, whose duty it was to make them, in the usual routine of their business, and without any interest to mislead or misstate. In this case, we have proved that the persons who made the entries were officiating Roman Catholic Clergymen. We have also proved their deaths and handwriting. There is abundant authority to sustain the admissibility of these entries. The class of cases, of which *Rice v. Lord Torrington* (a) is one, is conclusive on this point.

The LORD CHANCELLOR.

I am of opinion that these books are admissible. They contain the entries of deceased persons, made in the exercise of their vocation, contemporaneously with the events themselves, and without any interest or intention to mislead.

Reg. Lib. fol. 120, Saturday, 9th Nov. 1839.

(a) 1 Salkeld, 285.

* See the original suit, *Malone v. O'Connor*, Ll. & G. temp. Pl. 465, and S. C. Maclean & Rob. 468.

Saturday, November 9th,

**TAKING ANSWER OFF FILE TO PROSECUTE FOR
PERJURY.**

N— v. N—.

THIS was an appeal from an order made in this cause by the Master of the Rolls on the 1st of July last. By the order complained of, his Honor gave leave to W. N—, one of the defendants, to take certain answers and affidavits of some of his co-defendants off the file, in order that they might be used as evidence on a prosecution for perjury which W. N— alleged, and swore he was about to institute. His Honor granted that application, as of course, on an affidavit stating the mere intention to prosecute for perjury, and refused to hear any other part of the affidavit read, or to enter into the question, whether there was probable ground for the prosecution or not. From that order the defendants, whose answer and affidavits had been ordered to be taken off the file, now appealed to the Lord Chancellor.

On application to take the answer off the file to prosecute for perjury:—

Held, that a special case must be made to sustain such application.*

Mr. Warren, Q. C., and Mr. Holmes.

The order of the Master of the Rolls is wrong:—First, as being made as of course, without any grounds being laid for such a proceeding, except the mere statement of Mr. W. N—, that he intended to prosecute. The principle adopted by his Honor was contrary to the rule laid down by your Lordship in *Daly v. Toole* (a), which is in accordance with the practice of the Court of Exchequer. *Magowan v. Hall* (b). Here there are no grounds for granting such an application, and one of the parties upon whom it is now sought to cast the imputation of perjury is dead. Several years have elapsed, and it would be most cruel and unjust to countenance this attempt to make the proceedings in this Court an instrument of malice in the hands of an unscrupulous adversary. The cases of *Staford v. Green* (c), *Curtis v. Anon.* (d), and *Swift v. Quinlan* (e), rest on no sound principle.

Mr. Warren and Mr. Holmes having gone fully into the facts, as they appeared on the affidavits at both sides, contended that no probable or reasonable ground had been laid for the application.

Mr. Fitzgibbon, *contra*, went fully into the facts alleged in the affidavit on which the application was grounded, and contended that the order

* See *ante*, Vol. 1, p. 414.

(a) *Ante*, Vol. 1, p. 344.

(d) 1 Hog. 132.

(b) *Hayes*, 17.

(c) 1 Ball & B. 294.

(e) 1 Hog. 133.

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was quite sustainable on the view adopted by the Exchequer, without resorting to the principle that it is *ex debito justitiæ* to grant the application. A special ground had been laid. The affidavit of W. N— points out, in precise and specific terms, the parts of the answer and affidavits on which he intends to assign perjury.

LORD CHANCELLOR.

There are two questions which I am called on to decide:—First, whether documents of this nature, filed in this Court, may be taken off the file as a matter of course, *ex debito justitiæ*, on the application of a party in the cause, who says that he intends to prosecute for perjury. Secondly, whether, in this particular case, the documents should be taken off the file on the grounds which have been laid for that purpose. Now, as to the first question, it is said that the practice of this Court differs from that of the Court of Exchequer. It seems there has been no case found as to the practice of the Courts of England; and I cannot find that in this Court there is any decided or established practice on this subject. But I do find an established practice in the Court of Exchequer, directly contrary to the principle contended for, and which it is said, had been adopted by the Master of the Rolls, on the authority of cases as shewing the opinion of Lord Manners and Sir Wm. M'Mahon. I think the practice of the Court of Exchequer sound and reasonable. It appears to me most improper, that at the mere will of the party, the proceedings in this Court should be converted from the trial of a civil right into a criminal prosecution. As to the second question: it is said that the party has laid no grounds before the Court, on which it will exercise its discretion of allowing the documents to be taken off the file. But this is not a case of that kind. I find in this case statements by Mr. W. N—, in very precise terms, of the perjury he alleges to have been committed. If there be a trial for perjury, and if it fail, this Court will have an opportunity of afterwards dealing with the party prosecuting, when adjudicating the costs of the cause.*

See Reg. Lib. fol. 18.

* At the period of the publication of the above report (16th Jan. 1840) no order had yet been entered in the Register's book. The defect in the practice appears to be, that any application *in Court* is permitted in such cases. A side-bar rule, directing the Officer to attend with the record before the grand jury, and, upon the trial, would serve all the purposes of justice. See *Thomp-*

son v. Crosthwaite, 2 Y. & J. 512, where the application in Court appears to have been rendered necessary by the circumstance, that the party sought to have the record conveyed by the clerk of one of the going Judges of assize, instead of the Clerk in Court; and the order seems to have been made on motion, without notice.

ROLLS.

Saturday, November 2.

COSTS—APPLICATION THAT MASTER MAY EXECUTE CONVEYANCE UNDER THE STATUTE, DEFENDANT HAVING REFUSED.

CLARKE v. DE BURGH and others.

MR. MONAHAN, on behalf of the plaintiff, moved that the Master might be at liberty, pursuant to the statutes,* to execute the conveyance to the purchaser, under the decree in this cause, in the names of the defendants, who had refused.

The decree for a sale in this cause contained the usual direction, that all proper and necessary parties should join in the conveyance to the purchaser; and, pursuant to the decree, the lands in the pleadings mentioned had been sold. It now appeared, by affidavit, that the several defendants representing the estate, and named in the notice, had been personally served, on the 6th of July last, with copies of the exemplification of the decree, and of the deed of conveyance to the purchaser; and that, at the same time, the deed of conveyance to the purchaser had been tendered to each of them for execution, but that they had refused to execute it, without assigning any reason for their refusal.

When, in consequence of the defendant's refusal to execute the conveyance to the purchaser under the decree, it becomes necessary to apply that the Master may execute in their names, the estate is not to bear the costs of such application, but the defendants, whose improper refusal made it necessary.

* 23 Geo. 3, c. 35, amended by 4 & 5 Wm. 4, c. 78, by section 8, enacts, that when any person, who has been or shall be directed, by any decree or order of the Court of Chancery, to execute any deed or other instrument, or make a surrender or transfer, or to levy a fine or suffer a recovery, if it shall appear upon affidavit or affidavits, to be made to the satisfaction of the Court, that such person refuses, declines, or neglects to execute same, it shall and may be lawful for the Court, after the expiration of ten days from the service of the decree or order personally, and tender of such deed or instrument for execution, to make an

order, upon motion in open Court, that one of the Masters in Ordinary of the said Court shall execute such deed or other instrument, or make such surrender or transfer, or levy such fine, or suffer such recovery in the name of such person, and do all acts necessary to give validity and operation to such fine and recovery, and to lead and declare the uses thereof (a); and the execution of the said deed or other instruments, and the surrender or transfer made by the said Master, and the fine or recovery, &c., shall in all respects have the same force and validity as if the same had been made or executed, levied or suffered by the party himself.

(a) Fines and recoveries abolished by 4 & 5 W. 4, c. 92.

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MASTER OF THE ROLLS.—This conduct of the defendants is altogether unreasonable, and I will now establish a precedent which I shall follow in every similar case. When parties bound by a decree refuse, without any reasonable pretence, to execute a conveyance to the purchaser under that decree, and thereby render applications of this kind necessary, the estate shall not be burthened with the costs of their obstinacy; therefore, in granting the present application, it is a part of my order, that the defendants named in the notice shall pay the costs of it.

Saturday, Nov. 2d, and Friday, Nov. 15th.

**APPOINTMENT OF RECEIVER—PORTION OF LANDS
ALREADY IN POSSESSION OF ELEGIT
CREDITOR—PRIORITY.**

In the matter of **HARNETTS**, Executors of **HARNETT**, Petitioners,
and the Heir and Tertenants of **WILLIAM HARNETT**, Respondents,
and of the Act of 5 & 6 of *W.* 4, c. 55.

Where a puisne judgment creditor was in possession, under an *elegit*, of a small portion called *P.*, of the conuzor's estate, and a prior judgment creditor, proceeding under the judgment act, sought a receiver over the lands of *P.* only, stating as to the rest of the estate, viz., the lands of *K.* that persons were in possession for payment of prior charges. A

THE petitioners were proceeding under the judgment act, upon a judgment obtained in Trinity, 1810, against Wm. Harnett, since deceased, for the sum of £500, and lately revived by them against his heir and tertenants. Their petition sought a receiver over a small portion only of the conuzor's estate (viz., the lands of Portrenard, in the county of Limerick, the interest in which consisted of a profit rent of £39 a-year) of which one Hayes was in possession, under an *elegit*, upon a puisne judgment. As to the rest of the estate, viz., the lands of Knockbrack, in the county of Limerick, the petition and verifying affidavits stated, that by settlements executed upon the respective marriages of the two sons of the conuzor, and prior to the rendition of the judgment in the petition mentioned, the conuzor's said sons were entitled to take out of the lands of Knockbrack certain yearly sums, which, as the petitioners had been informed and believed, exceeded the annual income from that part of the estate; and that, in right of the said prior charges, the conuzor's sons were in possession of the lands. The petition further

conditional order having been obtained, and the *elegit* creditor having come in to shew cause, charging that the petitioners were in collusion with the respondents, and that all the lands of *K.* were not subject to the prior charges; and, therefore, insisting that the petitioners should go against those lands, and not disturb him:—*Held*, that there being no evidence of collusion, the prior creditor should not be put to search whether any of the lands of *K.* were unaffected by the prior charges, when there were the lands of *P.* in the possession of a creditor by an inferior title. That the judgment creditor proceeding under the judgment act, is to be considered entitled to all the rights of priority he should have had, if he had sued an *elegit* at law; and that the act was intended not to abridge, but to facilitate and extend such pre-existing legal rights: therefore, the cause shewn disallowed, and conditional order made absolute.

stated that petitioners did not know of any other lands, save the lands of Portrenard, which were in the possession of Hayes, a puisne judgment creditor under an *elegit*, out of which they could derive any benefit; and the prayer for a receiver, and the schedule of rents, issues, and profits were confined to those lands.

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In June last, a conditional order was obtained, pursuant to the prayer of the petition, and on the first day of the present sittings, Hayes, the *elegit* creditor in possession, came in to shew cause against it. His affidavit stated, that in Michelmass Term, 1821, he had obtained a judgment against the said Harnett, deceased, for the sum of £665 and costs, upon the revival of which, in Michaelmas, 1828, he issued an *elegit*; that the inquisition found that the conuzor was seized, at the time of the rendition of the judgment, of freehold estates, still subsisting, in the lands of Knockbrack and Portrenard, and that the sheriff having delivered to him possession of the lands of Portrenard, deponent brought an ejectment, and having obtained judgment shortly afterwards, went into possession and receipt of the rents of those lands. That the sum of £80 was still due to him on foot of the judgment; and that the petitioners ought not to be permitted to disturb him in his possession, because, at the time of the rendition of the judgment in the petition mentioned, the conuzor was seized of a freehold estate still subsisting in the lands of Knockbrack; and deponent was informed and believed, that the charges created by the settlements in the petition mentioned, affected a portion only of those lands, but did not affect the house and demesne, nor certain other portions of the estate of which the sons of the conuzor were now in possession under his will, or by titles subsequent to the rendition of the judgment in the petition mentioned. That the petitioners might proceed against those lands for the recovery of their demand, if they thought proper; but that being the near relatives of the persons in possession, they had declined so to do. That in Trinity Term, 1836, the testator, of whom the petitioners are representatives, proceeded to revive the judgment in the petition mentioned, against the heir and ter tenants of the conuzor; and that on the 7th of June, 1836, before the judgment was revived, this deponent caused a notice (set forth in the affidavit) to be served upon the said testator, apprising him that at the time of the rendition of the said judgment, the conuzor was seized of a freehold estate still subsisting in the lands of Knockbrack; and therefore requiring the said testator to revive the said judgment against the said lands, and cautioning him that the notice should otherwise be used by the deponent, in the event of his seeking to disturb deponent in his possession of the lands of Portrenard. That notwithstanding such cautionary notice, the said testator caused judgment to be marked, and in January, 1837, filed his petition in the Court of Exchequer for the appointment of a receiver over the lands of Portre-

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nard, pursuant to the act in the title of this matter mentioned; and in February, 1837, obtained a conditional order, against which this deponent shewed cause, which was allowed with costs, which costs were still unpaid and due to this deponent. That the present petitioners, with full knowledge of the notice already mentioned, and of the proceedings in the Court of Exchequer, refused to take any proceedings against the lands of Knockbrack, solely with the view, as deponent believed, of annoying him, and hindering the payment of the balance of his demand.

Mr. Collins, Q. C., and Mr. Kane, for Hayes, submitted that the petitioners were in equity bound to proceed against that portion of the conuzor's estate which was unappropriated to any creditor, and should not have sought to oust a *bona fide* creditor, by limiting their proceeding to the comparatively small and unimportant part of which he was in possession under an *elegit*. The present mode of proceeding is collusive, being plainly adopted out of favor to the persons in possession of the lands of Knockbrack, who are the near relatives of the petitioners. It might have been unobjectionable if the petitioners, when adopting it, had waived their priority to the creditor in possession; but as they insist on their priority, they should have proceeded to effect it without favor or affection. The petition in this case is only a repetition of the experiment already made in the Court of Exchequer, and should be followed by the same result: there, the same cause as that now shewn was allowed, with costs.

Mr. Wall, for the petitioners.—It may be doubted that this Court would have decided as the Court of Exchequer did; as the 5 & 6 W. 4, c. 55, does not take away or diminish any of the legal rights which a prior judgment creditor possessed before the passing of that act. However, it is unnecessary now to discuss the principles of the Exchequer decision; for the case before this Court has been brought forward with a statement of facts which was not before the Court of Exchequer. In the Exchequer, it did not appear, by the petition or verifying affidavit, that there was any reason for not proceeding against the lands of Knockbrack. The proceeding limited to Portrenard was, therefore, deemed collusive, and disallowed. But the present petition and verifying affidavit distinctly shew, that the reason why the petitioners do not seek a receiver over Knockbrack is, that such a proceeding could only make them liable to costs, as the entire income from those lands is insufficient to pay the charges created by the settlements prior to the rendition of the judgment upon which they are proceeding. Hayes admits the existence of the prior charges against Knockbrack; but says, he has heard and believes that they do not affect *all* the lands of Knock-

brack. This is no answer to the petitioners, who swear that they have heard and believe the contrary, and have, therefore, very good reason for proceeding against that portion of the estate as to which that prior right cannot be questioned.

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The case was ordered to stand for his Honor's further consideration.

Friday, November 15th.

The MASTER OF THE ROLLS now referred to this case, and delivered his judgment upon it, as follows :—

This was a motion on behalf of Patrick Hayes, an *elegit* creditor in possession of the lands in the petition in this matter mentioned, to shew cause why a conditional order for the appointment of a receiver, under the judgment act, should not be made absolute. The petitioners are the representatives of a prior judgment creditor; and the conditional order, in compliance with the prayer of their petition, is for the appointment of a receiver over that portion only of the conuzor's estate of which Hayes is in possession under his *elegit*. His cause is, that there is a balance still due to him on foot of his demand, and that although the demand of the petitioners is prior to his, they have no right to disturb him in his possession, because, he says, that there are other and sufficient lands in possession of the respondents, against which the petitioners might go. It appears, that in the year 1837, the Court of Exchequer, adjudicating between the same parties, allowed, with costs, the cause now shewn, when it was stated against a similar conditional order obtained in that Court. If the case now came before me in the same shape in which it was presented to the Court of Exchequer, I could not, without much hesitation, adopt a conclusion different from their's; but, as it appears to me, their decision does not apply to the case as it has been presented to this Court. I have held it over for consideration thus long, and am satisfied that the proceeding of the petitioners is not collusive. Their petition and verifying affidavit state, that they do not know of any lands, except those in the possession of Hayes, from which they could derive any advantage; as the other lands, viz., Knockbrack, are in possession of the two sons of the conuzor of the judgment, who are entitled, under registered deeds of marriage settlement, executed prior to the judgment, to annual charges upon those lands, exceeding their produce. Hayes admits the existence of the prior charges; but suggests, upon hearsay and belief, that they do not affect all the lands of Knockbrack. I cannot allow such cause against the petitioners' proceeding. If there be any lands so excepted as Mr. Hayes suggests, it may be to his advantage to find them out, as the 26 G. 3, c. 31, enables *elegit* creditors, who have been evicted before their whole debt has been levied, to issue a new *scire facias* for the residue; but I am not to put

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the prior judgment creditor upon this search, when he shews me lands in the possession of a creditor by a later and inferior title. "Priority is equity," is a maxim of high authority in this Court, and specially enjoined by the act of parliament under which the petitioners are proceeding. The appointment of a receiver under this act is a sort of equitable execution. The judgment creditor is to be considered to have the same rights as if he had issued an *elegit*; and this equitable proceeding was intended not to abridge, but to facilitate and extend his pre-existing legal rights. Had this act never passed, and had the petitioners, instead of the present proceeding, issued an *elegit* and proceeded at law, it could scarcely be contended that Hayes, in virtue of his *elegit*, could limit the lands to be extended by them in satisfaction of their prior demand: I am, therefore, clearly of opinion, that the cause shewn must be disallowed, and that the conditional order for the receiver must be made absolute; but, under the circumstances, I will say, let each party abide his own costs.

Tuesday, November 4th.

JURISDICTION—STOCK IN BANK IN NAME OF INFANT.

In the Matter of D. MURPHY, a Minor.

Where £90 stock was invested in the name of P. M., an infant, and the bank declined to pay the dividends for want of a sufficient receipt: upon petition of the infant's father, P.M., stating that the £90 was his own proper money, and had been invested by his wife, since deceased, under misapprehension, in his absence, that he was in great distress, and needed the dividends for the minor's support; and it further appearing that the minor was not a ward of Court, that no guardian had been appointed to him, and that there was no cause depending in which the desired order could be made:—Under the circumstances, the Court ordered that the Governor and Company of the Bank should pay the dividends due and to grow due "to the petitioner, as the natural guardian of the minor," for the minor's maintenance.

MR. ROLLESTON moved, on the petition in this matter, that the Court might be pleased to order, that the Governor and Company of the Bank of Ireland should be at liberty to pay to the petitioner the sum of £27. 4s., being the amount of dividends now due upon the sum of £90 stock, invested in 1830, and entitled in the bank books, "In the matter of D. Murphy, a minor:" and also the future accruing dividends upon said stock.

It appeared by the affidavit verifying the petition, that the petitioner was the father of the minor; that being a dealer in cattle, in the year 1830, when about to start for England to dispose of a stock, he left in his wife's charge the sum of £84; that having been afterwards detained in England several weeks longer than was expected, his wife, not knowing what had become of him, and supposing some disaster to have happened, invested the money left in her charge in stock, in the name of the infant, then about three years old, and had the said stock entitled in the bank books, "In the matter of D. Murphy, a minor;

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that his wife died in some time afterwards, and that from the manner in which the stock had been invested, and was entitled in the bank books, the bank declined to pay any of the dividends which had accrued due upon it, as there was no one at present qualified to give a sufficient discharge for such payment; that the petitioner was at present in great distress, and needed the dividends, to enable him to support the minor, and was willing that they should be so applied.

The MASTER OF THE ROLLS asked if the minor was a ward of Court, or if any guardian had been appointed to him? and was answered in the negative: the counsel observing, that the minor was in very humble circumstances, and had no property, except in so far as he might be deemed entitled to the small sum in bank. His Honor then inquired whether there was any cause depending, in which the desired order could be made? To this question, also, a negative answer having been returned—he said he would be glad to grant the prayer of the petition, if he could, but he doubted that he had jurisdiction so to do. However, he would consider the matter, and make the order, if, upon investigation, he should find that he had the necessary jurisdiction.

Upon a subsequent day, his Honor said—I have considered the matter of this petition, and have granted the petitioner's application, although in doing so I thought that I was going very far. However, under the circumstances, I framed the order for payment to the petitioner, as the natural guardian of the minor, so as to bring the case within the terms of the act.*

*By the 1 W. 4, c. 65, s. 32, it is enacted, that it shall be lawful for the Court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money, by virtue of any act for paying off any stock, and who shall be beneficially entitled thereto; or if there shall be no guardian, by an order to be made in any cause depending in the said Court, to direct all or any part of the dividends due, or to become due in respect of such stocks, or any sum of money to be paid to any

guardian of any such infant, or to any other person, according to the discretion of such Court, for the maintenance and education, or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sums of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.

Tuesday, November 4th.

WAIVER—SECURITY FOR COSTS—PLAINTIFF OUT OF JURISDICTION.

WATSON and Wife v. PIM and others.

Motion to stay proceedings, until plaintiffs, resident abroad, give security, refused, with costs: where the defendant was aware of the non-residence from the first, but delayed his application until a negotiation for amicable settlement opened by him, had terminated unsuccessfully, and several months had elapsed after service of the usual notice to press for his answer, and the further time given to him by the plaintiff to file his answer had nearly expired—*Held*, that the defendant had waived his objection; that if he meant to rely on it, he should have come immediately, or at least when he was served with the notice to press.

It is not misdescription of the plaintiff's residence when being resident abroad, but having an estate and residence called C., in the county of Tipperary, he is in the bill described as "of C., in the county of Tipperary," without further addition.

MR. R. C. WALKER, for the defendant Pim, moved that all proceedings in this cause be stayed, until the plaintiffs give security for costs, they being resident in Germany, out of the jurisdiction, and untruly described in their bill, as resident at Clonbrogan, in the county of Tipperary.

It appeared by the affidavits, that the plaintiffs, Watson and wife, were entitled, under the will of John Wheatley Johnson, after payment of certain debts and legacies, to an estate for the life of Mrs. Watson in the lands devised, and that the defendant Pim was the sole acting executor and trustee under the will. The testator died in 1817, and immediately afterwards, Pim proved the will, and took possession of all the testator's real and personal estate, and still continued in possession, alleging that some of the debts and legacies were yet unpaid.

On the 28th of January, 1839, the plaintiffs filed their bill for an account.

For some time prior to the filing of the bill, the plaintiffs had been, and still continued resident in Germany: but Watson, having an estate and residence called Clonbrogan, in the county of Tipperary, the plaintiffs were in their bill described as of Clonbrogan, in the county of Tipperary. It appeared distinctly, and was not denied, that there was no intention of concealing from the defendant the fact of the plaintiff's residence abroad; that it had been frequently mentioned in the communications between the opposite solicitors, and that the defendant was fully aware of it before and ever since the filing of the bill.

Shortly after the defendant appeared in this cause, he furnished the plaintiff's solicitor an account of his receipts and disbursements, as trustee and executor under the will; and this account being deemed unsatisfactory, and the defendant not having removed the objection to it, a notice to press for his answer was served on the 29th of April. An amended account was then furnished, and a protracted discussion ensued, during which no further step was taken in the cause; but on the 21st of September last, the plaintiffs having then abandoned all hope of private arrangement, their solicitor wrote to the defendants' solicitor, requiring him to file the defendants' answer, and giving him until the 21st of October to do so; at the same time apprising him, that if the answer should not be filed on that day, process should be entered up. To this

C., in the county of Tipperary, he is in the bill described as "of C., in the county of Tipperary," without further addition.

notice no answer was returned; but, on the 28th of October, the defendant gave notice of the present application.

Mr. *Walker* submitted, that in this case there were two distinct grounds, upon either of which the defendant was entitled to stay the proceedings until the plaintiffs gave security for costs:—First, that the plaintiffs were out of the jurisdiction; as to which, it made no difference that they had property in this country; *Lord Lucan v. La Touche* (a). Secondly, that the plaintiffs, being resident abroad, had untruly described themselves in their bill as resident at Clonbrogan, in the county of Tipperary. *Calvert v. Day* (b); *Sandys v. Long* (c).

Mr. *Lyons*, for the plaintiff.—The defendant should have put in his answer instead of making this application, having long since waived his right to stay the plaintiffs' proceedings. *Robinson v. Bradley* (d); *Ongé v. Truelock* (e).

MASTER OF THE ROLLS.—In my opinion, this application fails on both grounds. The defendant knew from the first, and has had a continuing knowledge of the fact, that the plaintiffs were resident abroad. No doubt, he was clearly entitled to object to their proceedings, until they gave security for costs; but if he meant to rely upon this objection, he should have come to the Court immediately, or, at latest, he should have come when the plaintiff took a further step, by serving him with the regular notice to press for his answer. That notice was served so long back as the 29th of April, and the defendant then, instead of questioning the right of the plaintiffs to proceed without giving security for costs, furnished to their solicitor a further account, which, upon examination, being deemed unsatisfactory, a notice was served on the 21st of September, requiring his answer, and extending the time for filing it to the 21st of October. Not until the time thus extended had nearly expired, was the notice given of the present application, and the defendant had then clearly waived his right to object to the non-residence of the plaintiffs.

As to the alleged misdescription, it is admitted that the plaintiff, Mr. *Watson*, is possessed of an estate and residence named Clonbrogan, in the county of Tipperary, which may be said to be his proper home; and I think it is a mistake to say, that because the plaintiffs are at present resident abroad, they have untruly described themselves as of Clonbrogan, in the county of Tipperary. Certainly, the defendant has not been misled by it.

Order:—Refuse the application, with costs.

(a) 1 Hog. 448.

(b) 2 Y. & Col. 217.

(c) 7 Sim. 140.

(d) 4 Law Rec. N. S. 9.

(e) Beat. 339.

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Friday, November 8th.

TENANT—INTERPLEADER BILL.

DORAN v. EVERITT and others.

BYRNE v. EVERITT and others.

It is no objection to bill of interpleader by tenant, that it appears by his bill that the rent was adversely demanded by two persons, one of whom had *prima facie* a legal right to receive it, as devisee and executrix of the lessor having proved his will, and the other a mere equitable claim as heir-at-law, alleging that the will was obtained by fraud, and void, where the adverse claimants were litigating, and the tenant was threatened with distress. *Seemle*, the tenant, though not a party in the principal cause, may have served notice, and applied in that cause, without putting the estate to the expense of an interpleader suit.

BILL of interpleader.* The bill stated that Anthony M'Dermott, being seized in fee, or of some sufficient state of inheritance in the lands, by indenture, bearing date the 30th of June, 1831, and made between the said A. M'Dermott, of the one part, and the plaintiff of the other part, demised to plaintiff 143 acres (Irish plantation measure) of the lands of Roughgrange, with the appurtenances, situate, &c., and then in his actual possession, to hold to him, his heirs, executors, administrators, and assigns for the life of E. P.; and in case the said E. P. should happen to die before the expiration of twenty-one years, to be computed from the 1st of May then last past, then to hold to plaintiff, his executors, administrators, and assigns, for so many years of the said term as should be to come and unexpired at the death of the said E. P.: yielding and paying to the said A. M'Dermott, his heirs and assigns, the yearly rent of £150. 12s. 2d., by two equal half-yearly payments, &c. And said lease contained the usual clauses for distress and re-entry.

That plaintiff regularly paid the rent reserved to the said A. M'Dermott, during his life; and that on the 10th April, 1832, the said M'Dermott being seized of the reversion, duly made and published his will in writing, executed to pass real estate, whereby he devised all his real estate whatsoever and wheresoever unto the defendant Charlotte Everitt, by the name and description of "his dear wife Charlotte M'Dermott,"† her heirs and assigns, for ever, and appointed the said Charlotte executrix of his said will. That the said A. M'Dermott afterwards departed this life on the 16th Sept. 1832, without having altered or revoked his said will, leaving the said Charlotte surviving; and that she thereupon proved said will, and obtained probate thereof in the proper Ecclesiastical Court.

That the said Charlotte, having claimed the rents due from plaintiff, as devisee of A. M'Dermott, and no adverse claim having been set up, plaintiff paid, and continued to pay the rent to her, up to and for the 1st of May, 1837. That in the year 1834, the said Charlotte assumed the name of Calverly, and, with one Joseph Calverly as her husband, received the rents. That she afterwards stated herself to be the wife of the defendant Thomas Everitt, and under

* As to bill of interpleader generally, see *Belbee v. Belber*, 6 Mad. 28; *Cornish v. Tanner*, 1 Y. & J. 333; *Lloyd v. Tenck*, 1 Ves. sen. 213; *Warrington v. Wheatstone*, 1 Jac. 202. As to bill by tenant, *Dungey v. Angove*, 2 Ves. jun. 312; *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. B. ne*, 13 Ves. 383.

† See *M'Dermott v. Everitt*, *ante*, vol. 1, p. 96.

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the name of Charlotte Everitt, she and the said defendant Thomas Everitt, in the month of August last, executed a power of attorney to their solicitor, Mr. Babington, to receive the rents. That on the 1st of November, 1837, plaintiff was served with a notice in writing (set out at length in the bill) from Thomas M'Dermott, another of the defendants, claiming to be heir-at-law of the said A. M'Dermott, and apprising plaintiff that the will set up by the said Charlotte was obtained by fraud, and void, and that a suit had been instituted to have said will declared fraudulent and void; and therefore cautioning plaintiff not to pay any rent due or to grow due out of the premises to the said Charlotte, or any person on her behalf; or that the said Thomas M'Dermott would seek to charge plaintiff with the same.

That on the 9th of December, 1837, a bill was filed in this Court, wherein the said Thomas M'Dermott is plaintiff, and the said Charlotte and several others are defendants, whereby the said Thomas claims to be heir-at-law of the said Anthony, and impeaches the title of the said Charlotte to any estate or interest under the will of the said Anthony, and alleges that the said Charlotte was not the wife of the said Anthony, at the time of the execution of the said will, nor at all; and the said Thomas claims to be entitled, as against plaintiff, to all rent that accrued due after the service of the said notice of 1st November, 1837. That the said Charlotte answered the said bill on the 8th of May, 1839, and asserts her title as devisee; but that plaintiff was not made a party to said suit.*

That since the service of the notice of the 1st November, 1837, the plaintiff had not paid any rent to either of the claimants, and then owed £301. 4s. 4d., being two years' rent, up to and for 1st May, 1839, which he was ready to pay to the person or persons duly entitled to receive it.

The bill then set forth several notices served upon him by the defendants, Charlotte Everitt and Thomas M'Dermott, respectively, demanding payment forthwith of the rent due, and threatening to distrain, in the event of non-payment by a certain day.† Prayer:—That the said Thomas M'Dermott, and Charlotte Everitt and Thomas Everitt, respectively, may set forth to whom the said rent is due and payable, and may be directed to interplead, &c.: plaintiff undertaking and offering to account for and pay the arrears of said rent, now due from him, to such person as the same shall appear as of right to be payable to, and also to pay all future gales in like manner, on being indemnified by this Honorable Court for so doing; or to pay the same into the hands of the Accountant-General, to be disposed of as the Court shall direct.

* See *Belbee v. Belbee*, 6 Mad. 28.

† See *Rowland v. Powell*, Ridg. Cas. Temp. Hardw. 260; *Blennerhassett v. Scanlan*, 2 Mo. 539.

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And that the said defendants might be restrained, by injunction, from proceeding at law for the recovery of said rent, &c.

Mr. *James Plunket*, for the plaintiff, now moved, upon the bill and verifying affidavit, that the said plaintiff might be at liberty to bring into Court, and lodge with the Accountant-General, to the credit of this cause, the sum of £301. 4s. 4d., being the amount of two years' rent due by him out of his holding of part of the lands of Roughgrange, up to and for the 1st of May last, and also the accruing and future gales of his said rent, as they should become due and payable, until the rights of the said defendants shall be determined; and that upon such lodgment, an injunction should forthwith issue, to restrain the said defendants, and every of them, from all proceedings at law for recovery of the said rent, &c.

Mr. *Keatinge*, Q. C., with whom was Mr. *Barry*, for the defendant, C. Everitt, submitted that this application should be refused. The plaintiff, by his bill, shews a clear legal title, in the defendant, C. Everitt, under the will of Anthony M'Dermott, to receive the rents. It does not appear that the testator exceeded his right, or laboured under any incapacity when devising his estate as he has done. All that can be spelled out of the several notices set forth in the bill, and stated to have been served upon the plaintiff by the defendant, Thomas M'Dermott, is, that upon a loose and unsupported allegation of fraud he grounds a precarious claim. This cannot justify the tenant in filing an interpleader bill, nor in refusing to pay the person in whom he shews the clear legal title to receive the rents.—[MASTER OF THE ROLLS. It appears by the bill that Mrs. Everitt claims the rent as devisee of the lessor; and that the defendant, Thomas M'Dermott, claims as heir-at-law, alleging, that under the circumstances set forth in the notices, the will was obtained by fraud.* It further appears that Thomas M'Dermott has instituted proceedings to establish his right, and that the tenant is threatened with distress. The tenant, therefore, shews a sufficient case

* But note, that although adverse claims, whether the quality of their alleged titles be legal or equitable, or, as in the case above, the one legal and the other equitable, will entitle the tenant, when threatened with distress or other proceedings, to file an interpleader bill and obtain an injunction; the existence of a mere adverse demand is not sufficient, nor will the allegation of it sustain the bill: it must appear that each of the adverse claimants has a *prima facie* title; and the adverse titles must be shewn upon the bill, that the Court may see there is a serious question between them, and that until the claimants interplead, it must remain in doubt to which of them the right really belongs. In the case of *Scott v. Glenn*, which was an interpleader suit, there was an application, during the present sittings (November 26th), that the plaintiff might be at liberty to pay into Court the amount of an annuity charged upon his estate, and adversely claimed. The bill stated that the annuity had been granted to a married woman for her life; that she and her husband agreed to assign it, and that it was accordingly assigned (by deed duly registered), for valuable consideration, and had been paid to the assignee for some years; that the lady, being now a widow, demanded the annuity, and insisted that the

for coming to the Court for relief.]—The plaintiff does not, by his bill, negative collusion between him and the defendant Thomas M'Dermott, who, having no case for a receiver in his own cause, is now probably trying the expedient of inducing the tenants to file interpleader bills.

Mr. *Plunket*, in reply.—The plaintiffs' affidavit, which must be conclusive in this case,* distinctly negatives collusion, and states that he has filed his bill, fearing that if he should pay either of the adverse claimants, he would be distrained by the other.

MASTER OF THE ROLLS.—I think Mr. *Plunket* is entitled to carry his motion; but as, from the nature of the principal suit, there can be no use in carrying the cause further, the plaintiff had better take care not to enforce answers from the defendants. Let him, within a week, pay in the amount of his rent due, and let an injunction (a) issue as is desired.

In a few days after the foregoing application,

Mr. *O'Callaghan*, for Byrne, another of the tenants, who had filed an almost exactly similar bill to Doran's, moved, on his behalf, for a similar order. It appeared that several other tenants of the estate were about to make similar applications, and had already filed, or were preparing to file similar bills.

His HONOR granted the application, but observed, that the most proper course for the plaintiff would have been, to have served notice, and applied in *M'Dermott v. Everitt*, the principal cause, instead of putting the estate to the needless expense of an interpleader suit.†

* See *Langstone v. Boylston*, 2 Ves. jun. 101; but see *Dawson v. Yates*, 1 Beav. 301.

(a) See *Swanston v. Simpson and another*, 1 Jones & Carey, 188.

assignment was executed without her consent, when she was a married woman, and under duress, and therefore void as against her. It further appeared that the adverse claimants both threatened to proceed against the plaintiff; but it did not appear in what terms, and whether subject to any and what conditions the annuity had been originally granted, nor whether the deed of assignment had ever, in fact, been executed by the lady; in other words—the bill did not shew, with any certainty, what were the adverse titles, nor that the claim of the assignee had any color of title whatever. The Court, therefore, refused the application, which, it will be observed, was not for an injunction, but only for leave to take the preliminary step, viz., to bring in the money:—the Master of the Rolls observing, that parties should be cautious how they proceed upon bills of this kind; and that he recollected the case of a gentleman, upon whose estate the sum of £2,000 was charged, and who, having filed an interpleader bill very similar to that before the Court, and having brought in the money, after considerable litigation in the cause, had to pay all the costs of it.

† As this rule was not stated in Doran's case, nor until it had appeared to the Court that the estate was likely to be put to ruinous cost by numerous interpleader bills, of which from the nature of the principal suit, there could be no need, except to ground the tenant's application, it seems reasonable to infer, that it should be understood as applicable only in such cases, and not as a general rule. See *Belbee v. Belter*, 6 Mad. 28.

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Tuesday, November 12th.

NOTICE OF MOTION.

CREED v. CREED.

When a notice of motion is personally served upon a party out of Court, it should be of a motion to be made on a particular day, and not "on the first opportunity."

THIS cause was out of Court, no proceedings having been taken in it for twelve months, when the defendant, on the 31st of October last, personally served the plaintiff, whose solicitor had died, with notice of a motion, to be made on the first opportunity.

Mr. Monahan now moved upon the notice.

MASTER OF THE ROLLS.—This notice is irregular. It appears the plaintiff is an elderly person resident out of Dublin, and whose solicitor is dead. Notice of motion, to be made on the first opportunity, is the common form, and may be quite sufficient as between professional men, who know what is meant by "the first opportunity;" but such a notice might be, in fact, no notice at all, to a person unacquainted with the rules and practice of this Court. Therefore, when a notice of a motion is to be personally served upon a party out of Court, it should be of a motion to be made upon a certain day, and not, as in this case, upon the first opportunity. You must serve a new notice.

Thursday, November 14th.

SETTING DOWN SUPPLEMENTAL CAUSE FOR DECREE PRO CONFESSO.

SMITH v. CHICHESTER and others.

SMITH v. SCOTT.

Where, after the original cause had been set down for hearing in the Chancellor's list, one of the defendants became insolvent and the plaintiff filed a supplemental bill, bringing his assignee before the Court: the time for answering having expired, the supplemental cause was set down in the Rolls' list, to be heard on bill *pro confesso* against the assignee, the original cause being as yet unheard:—*Held*, that before the hearing of the original cause, there could be no decree in the supplemental cause, as there would otherwise be two decrees; and, therefore, that the supplemental cause must be set down to be heard with the original cause.

AFTER the original cause had been set down in the Lord Chancellor's list, to be heard upon an order to take the bill *pro confesso* against the defendant, Sir A. Chichester, and upon pleadings and proofs as to the other defendants, Sir Arthur Chichester became insolvent, and George Scott was appointed his assignee. The cause having therefore been withdrawn, to rectify the defect, the plaintiff filed a supplemental

bill against George Scott, the assignee.* Scott did not answer, and, a month after the service of the notice to press having expired, the supplemental cause was now set down in the Rolls, for decree *pro confesso* against him. There was as yet no decree on the original cause.

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Mr. *Robert Tighe*, for the plaintiff, read the prayer of the supplemental bill, &c., and prayed his Honor's decree against the defendant, George Scott.

MASTER OF THE ROLLS.—As there is no decree in the original cause, I cannot decree in the supplemental cause; otherwise, there should be two decrees. Both causes must be set down to be heard together, and then, only, can a decree be pronounced in either of them.†

* But as to the supplemental bill, when one of several co-plaintiffs becomes insolvent, pending the suit, see *Feary v. Stevenson*, 1 Beav. 42.

† See *Knox v. Knox*, *post*, p. 34.

Thursday, November 14th.

TENANT IN TAIL BORN PENDING THE SUIT—AMENDMENT—SUPPLEMENTAL BILL—51st, 52d, AND 53d
GENERAL ORDERS (Nov. 1834).

KNOX v. KNOX.

MR. PAKENHAM, on behalf of the plaintiff, moved, on notice, for leave to amend the bill, by striking out the name of the defendant Jane Knox; and also for liberty to file a supplemental bill, bringing John Hunter Knox, the infant son of the plaintiff, before the Court, without prejudice to the proceedings against the defendant George Knox.

It appeared that the original bill in this cause was filed in August, 1838, by the plaintiff, as remainder-man for life under the will of John Knox, against the defendant, George Knox, the tenant for life in possession under the same will, to set aside an alleged leasehold title on the estate, obtained by the defendant from the testator in his lifetime. The defendant George Knox answered the original bill, which was afterwards amended on the 8th of May, 1839, and no further answer had as yet been obtained. Since the amendment, the plaintiff had a son born, who was christened by the name of John Hunter Knox, and entitled to an estate tail in the premises, the subject of the suit, prior to that of Jane Knox, who had been made a defendant, as entitled, at the

A tenant in tail coming in *esse* before issue joined, may be made a party by amendment of the bill.

It is improper to move for leave to file a supplemental bill, either before or after issue joined, as no order is necessary for that purpose.

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time the bill was filed, to the first estate of inheritance. It was now sought to amend the bill, simply by striking out the name of Jane Knox, whose estate had been postponed.

The first part of the application was as of course, under the 55th New Rule, as whether A. or B. represents the inheritance could make no alteration in the case of either the plaintiff, or the defendant George Knox.

As to the second branch, it was submitted, that as respects the filing of supplemental bills before issue joined, there is no difference between the old rules and the new; and although generally, supplemental bills should not be filed before issue joined, the case of a prior tenant in tail coming in *esse* was an exception; as such a party was always to be brought before the Court, at whatever stage of the suit, by supplemental bill: *Anonymous* (a). The plaintiff has a right to a declaration as against a new tenant in tail, that the proceedings had in his absence are regular: and this may properly be made the prayer of a supplemental bill, but is scarcely consistent with the nature of an amended bill.

The case was ordered to stand for consideration.

Wednesday, November 20th.

THE MASTER OF THE ROLLS now referred to the foregoing application, and having read the notice of motion, and stated the facts already mentioned, proceeded as follows:—

The first part of this application is of course; but the other raises a question, respecting which doubts have been entertained very generally, and I have therefore held the case over for consideration, and examined it closely.

It is said that a tenant in tail, born pending the suit and before issue joined, must be brought before the Court by supplemental bill, and cannot be made a party by amendment. In support of this doctrine, an anonymous case, reported in the second volume of Mr. *Molloy's Reports*, has been referred to, in which the late Master of the Rolls is reported to have said—"I have on former occasions investigated the subject, and decided, that *in every stage of a suit*, a child coming *inter esse* pending the suit, must be made a party by supplemental bill, and not by amendment. *It is always so in the case of an infant tenant in tail*, and, I think, in all other cases." The date of that case, as stated in the report, is the 9th of March, 1829, and I have caused the strictest search to be made for it in the Register's books of that period, but no such case could be found of that date. The only case at all like it, and near that time, of which any entry could be found, appears to

(a) 2 Moll. 312.

have occurred some weeks later than the date of the report. It was *Usher v. Newenham*, in which I moved for liberty to bring before the Court, by amendment, an infant born pending the suit; but that was *after* issue joined. In all probability this was the case intended by the report, as the apparent variance of dates might easily be accounted for. If it was, as is most likely, it is plain that the case reported was not a decision upon the point now before the Court; and, as applicable to the present case, can be considered only as a *dictum*.

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Lord Middleton's order of the 15th of June, 1719, declared it for a general rule, that no supplemental bill shall be filed before issue joined on the original bill; but the plaintiff must amend his bill, and pay costs for the defendant's further answering. The Exchequer rule, of the year 1715, is to the same effect, but more peremptory. By those rules, until issue joined, it was necessary to introduce, by way of amendment, such new matter as in England is usually brought forward by supplemental bill; and from this difference grew up the further peculiarity in Irish practice, namely, the motion for liberty to file a supplemental bill. In *Scully v. O'Brien* (a), the late Master of the Rolls decided that, until issue joined, the plaintiff must amend, and could not obtain leave to file a supplemental bill, except by motion upon notice. That decision was a rigorous assertion of the old rule: and in *Hammond v. Hammond* (b), which is reported by Mr. *Molloy* in the very same page with the anonymous case already mentioned, we find Sir Anthony Harte saying: "I prefer amendment of the bill, whenever it can be done consistently with rule; and I should prefer it, even in cases in which, according to the rule, it is not now done, to permitting supplemental bills and original bills, in the nature of supplemental bills, to be put as riders one upon another. I have found, that tying one record upon another is very inconvenient, and that successive bills, linked one to another, have a great tendency to drag one down after the other." The preference thus deliberately given, by Sir Anthony Harte, to amendment according to the Irish rule, instead of filing a supplemental bill, according to the English, independently of its judicial authority, is of very great importance; because it was the judgment of one, not only of great experience in equity pleading, but who had been trained in and long accustomed to the English system.

In this state of the authorities, the General Orders of Nov. 1834 were promulgated after much deliberation, having been framed under the particular direction of the late Master of the Rolls, and in a great measure by himself; and notwithstanding what he is reported to have said in the anonymous case of 1829, already mentioned, we have not only his decision in *Scully v. O'Brien*, in 1826, rigorously enforcing the rule of 15th of June, 1719—carrying it to a questionable length; for, on

(a) 1 Hog. 386.

(b) 2 Moll. 312.

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inquiry, it appears that the application was after issue joined—but also, the 51st and 53d General Orders of Nov. 1834, leaving the old rule of 15th June, 1719, in full force, and providing a formula for amendments pursuant to its provisions. By the 51st of the New Rules, it is declared that the amended bill “shall contain the whole case of the plaintiff, as he intends that the same shall, at the time of amendment, stand upon the record, *including such further facts as have occurred before replication, up to the time of such amended bill.*” No exception is mentioned,* and, upon principle, I would say, there ought not to be any; for besides the general inconvenience of a multiplicity of records noticed by Sir A. Harte, I must observe, that supplemental bills, before issue joined, have an obvious tendency to render simple cases needlessly complicated, and to delay the progress of the cause; and that such bills, for the purpose of making new parties, create much difficulty when the plaintiff seeks to have the bill taken as confessed in the supplemental suit.† I therefore think, that it would be highly inexpedient, and against principle, to limit the application of the latter part of the 51st Rule by the first part of it, so that no fact arising *after* the filing of the bill could be introduced by amendment, unless such amendment involved the introduction of other facts which occurred *before* the filing of the bill, and the necessity of a new engrossment. Upon such construction, every further fact, though to be stated in six lines or in one, would need a supplemental bill, and the number of such bills in each case should be without limit. I cannot think that such was the intention of the rule, and I am therefore of opinion that, as in the present case, issue is not joined, the infant tenant in tail, born since the bill was filed, may be brought before the Court by amendment, and that a supplemental bill is not necessary for the purpose, at this stage of the cause. I should also observe, that the clause of the 51st New Rule, which is in italics, and within which, as I conceive, this case properly comes, was not in the rule as originally framed, but was subsequently introduced by the late Master of the Rolls, who was understood to have intended it to include every species of additional fact and statement which might become necessary to the frame of a suit before issue joined.

The reason and meaning of the 52d New Rule are not very clear. But, supposing that upon the construction of the 51st and 52d New

* 51st General Order (Nov. 1834).—“Where matters occurring before the bill filed cannot be introduced by interlineation plain and legible, a new engrossment of the old bill shall be filed, and such engrossment shall re-state the case of the plaintiff as he intends the same shall at the time of amendment stand upon the record, *including such further facts as have occurred before replication up to the time of such amended bill*; and such new engrossment shall be affixed to the old bill, being first marked by the proper officer, as follows: “Amended bill, filed the day of .”

† See *Smith v. Chichester*, *ante*, p. 32.

Rules,* it should be held, that as the plaintiff seeks to bring before the Court only a formal party, who was born *since* the bill was filed, he must do so by supplemental bill (a), and not by amendment. It would then be necessary to consider the further question, viz., whether a motion for liberty to file a supplemental bill is necessary?

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In the case of *Pepper v. Pepper* (b), upon a motion for liberty to file a bill of revivor and supplement, the late Master of the Rolls said, that by the construction which had been put upon the old Rule of 15th June, 1719, a plaintiff could not file a *mere* supplemental bill, without motion, but that the rule did not extend to a bill of *revivor and supplement*. He therefore refused to make any order upon the motion. In the Court of Exchequer, where there was a rule similar to the Chancery Rule of 15th June, 1719, Lord Guillemore, as I stated upon a former occasion (a), would never make any order upon a motion for leave to file a supplemental bill, upon the ground that such a motion was unnecessary. *Pepper v. Pepper* clearly shews, that the late Master of the Rolls thought the application usual in Chancery was an effect of the old rule, which was not desirable, and which should therefore be avoided as far as possible. I am of the same opinion: I think that when a party desires to file a supplemental bill, it is much better that he should do so at once, as he may be advised, of course at his peril, than that he should be delayed by the vain form of an application probably in the absence of all the parties in the cause, to obtain a negatory order, which cannot in the least degree control or influence the character or consequence of the subsequent proceeding, nor be productive of any other effect than merely that of swelling the costs. The 53d New Rule† was intended to reduce the practice of moving for liberty to file supplemental bills; and in *Houlditch v. Donegal* (c), Lord Plunket, upon the construction of that rule, decided that applications for leave to file supplemental bills were unnecessary, as well *after* as before the hearing of the cause. In the report of that case, it is stated that his Lordship was of opinion, that the 53d New Rule was only intended to *repeal* the order of 15th June, 1719; but in *Mr. W. Smith's* collection of the Chancery Rules, it is suggested, in a note to the 53d New Rule, and I think with reason, that there is some

* 52d General Order (Nov. 1834).—"All new matter occurring subsequent to the filing of the old bill shall be stated by a new bill, confined exclusively to such new matter and such new bill shall not re-state the matters or charges contained in the old bill, and such new bill is to be affixed to the original bill, being first marked by the proper officer, at the Rolls' office, according to the date of filing same."

† 53d General Order (Nov. 1834).—"In all cases after issue joined, and before the hearing of the cause, the plaintiff shall be at liberty to file a supplemental bill, as he may be advised, without any order of the Court for that purpose."

(a) See *Raymond v. Evans*, *ante*, Vol. I., 430.

(b) 2 Hog. 19.

(c) 1 Ll. & G. 428.

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mistake as to the word "*repeal*."* Adopting the principle of the Lord Chancellor's decision in *Houlditch v. Donegal*, and for the reasons I have stated, I am of opinion that the application for liberty to file a supplemental bill is unnecessary, as well before issue joined as afterwards: and therefore, that I should not make any order upon that part of the present application which seeks liberty to file a supplemental bill, even if it appeared that such a bill ought to be filed.† Therefore, my order is,

That the plaintiff be at liberty to amend his bill, by striking out the name of the defendant, Jane Knox, and by making John Hunter Knox a party defendant, if so advised, without prejudice to the proceedings against the defendant George Knox.

When his Honor had delivered his judgment in the foregoing case, Mr. *Brewster*, Q. C., *amicus curiæ*, stated, that very soon after the first publication of the rule of November, 1834, a question of considerable difficulty occurred to him in practice, under the 51st New Rule; and as the late Master of the Rolls had expressed a desire to receive suggestions from the Bar upon the subject of those rules, he waited upon him, and stated the difficulty which had arisen; and in consequence of the communication which then took place, the late Master of the Rolls inserted, in the 51st Rule, the words in italics, which were intended to provide for and include every alteration in the frame of the bill before issue joined.

* The reporter is authorised by Messrs. *Lloyd* and *Goold* to state, that the word used by the Lord Chancellor was "*repeal*," as in the report. The point of his Lordship's observation seems to have been, that the 53d New Rule was intended to *abolish* the practice which had grown up under the old rule of 15th June, 1719, of moving for liberty to file supplemental bills: in other words, to repeal that which had, in effect, become a portion of the old rule.

† In *Raymond v. Evans*, ante, Vol. 1, p. 30.

Monday, November 18th.

ATTACHMENT—WANT OF DEFENDANTS' ANSWER.

O'BRIEN and another, Plaintiffs;

RICHARD MANDERS, ROBERT MANDERS and MICHAEL POWELL, and another, Defendants.

THE defendants, Richard and Robert Manders, and Powell, being in partnership, and trading under the title of Manders and Co., having been served with the notice to press, and their answer not having been put in within the month limited by the notice, the plaintiffs' attorney issued attachments against them. The month expired on Saturday, the 16th November, and the attachments were issued on this day.

Except in the case of a bill for discovery, an attachment, for want of an answer, ought not to be issued, and will be set aside, as the object of the suit may be fully attained by taking the bill *pro confesso*.

Mr. HAIG, for the defendants, now moved that the execution of those attachments should be suspended, until the defendants should have an opportunity of applying, upon notice, to be served immediately, that the attachments so issued should be set aside. The affidavit of the defendants' solicitor stated, that the conduct of one Mathews, who was made a co-defendant with Manders and Co., but who was in collusion with the plaintiffs, had delayed the preparation of the defendants' answer. That on Saturday, the 16th November, the deponent served a notice on behalf of Manders and Co. on the plaintiffs' solicitor, requiring him to consent to give one month's further time to answer; and that if he declined to do so a motion would be made to obtain such further time. The only reply made to this notice was a letter directed to the defendants, Manders and Co., and their solicitor had now discovered that attachments had actually been issued. The affidavit further stated that the plaintiff, O'Brien, was an insolvent debtor, and the other plaintiff his assignee: that both were bailiffs, or men of that description; and that the suit was not for discovery, but got up merely for annoyance and extortion. Mr. Haig submitted, that as the bill did not seek any discovery of such a nature as to make an attachment for want of answer necessary, such an attachment ought not to have been issued, as the bill might have been taken *pro confesso*.

THE MASTER OF THE ROLLS.—I will suspend the execution of these attachments. No solicitor should issue an attachment for want of answer, where the purposes of the suit would be attained by taking the bill *pro confesso*. I recollect Lord Guillamore frequently saying that, except in cases where a discovery is sought, of such a nature that the plaintiff cannot obtain his relief by decree, *pro confesso*, no attachment for want of an answer ought to be issued.

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Suspend the execution of the attachments, and let the defendants serve notice of a motion to set them aside.

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On this day Mr. HAIG moved, on notice, to set aside the attachments, and for a month's further time to answer. No one appeared on the other side.

His HONOR made the order accordingly: observing that he was making an indulgent order, in not charging the plaintiffs' solicitor with the costs.

[Sergeant Jackson subsequently came into Court, and said he had been instructed to appear for the plaintiffs, but was accidentally out of Court. He did not, however, object to the order made by His Honor, but as the affidavit on which the application was grounded reflected on the solicitor for the plaintiffs, he craved leave, on his behalf, to file an affidavit for the purpose of exonerating himself from those charges. The affidavit was filed accordingly, denying that the object of the suit was annoyance or extortion, or that the plaintiffs were bailiffs. Some further discussion took place on a subsequent day, but no change was made in the order.]

Monday, November 25th.

MOTION FOR RECEIVER—DECREE PRO CONFESSO.

Rogers v. Newton.

When, upon decree *pro confesso*, the plaintiff moves for a receiver, he must shew, by affidavit, the sum due for principal, interest, and costs, after all just allowances, and that defendant is in possession, as due, &c.

THIS was a foreclosure suit, in which the bill prayed a sale, and that, in the mean time, a receiver might be appointed. It was heard upon bill *pro confesso*, and there was a decree pursuant to the prayer of the bill.

Mr. Keatinge, Q. C., for the plaintiff, now moved that a receiver might be appointed over the mortgaged premises, pursuant to the decree.

THE MASTER OF THE ROLLS asked whether there was any affidavit as to the sum due on foot of the mortgage, and as to the mortgagor being in possession?—Mr. Keatinge answered that there was not; but that the bill, which stated the sum due on foot of the mortgage, had been taken as confessed.

HIS HONOR then said.—That is not enough. When, upon a decree *pro confesso*, the plaintiff moves for a receiver, he should shew, by affidavit, the sum due for principal, interest, and costs, after all just credits and allowances, and that the defendant is in possession.

No rule.

Monday, November 18th.

PRIORITY—FUND IN COURT—BY-GONE RENTS.

MURTAGH v. TISDALL.

WHITE v. same.

CUFFE v. same.

NEWBURGH and others v. same and others.

TISDALL v. same and others.

JOHN TISDALL, the principal defendant in these several causes, being tenant for life of the lands in the pleadings mentioned, by indenture, bearing date the 10th of July, 1808, granted, for valuable consideration, to his father-in-law, Sir Jeremiah Fitzpatrick, an annuity of £400, for their joint lives, charged upon the said lands: with power to Sir Jeremiah, in case he should die before the said John, to appoint £200 of the said annuity, from and after his decease, to any of John's children, for and during John's life; the other moiety to be determined. This deed was registered, but the memorial of it referred only to the grant of

In 1829, C., a mortgagee, by deed of 1826, duly registered, and W., an annuitant, by deed of 1827, duly registered, filed separate bills for the arrears due to them, and a receiver having been appointed, and

extended to both causes, it was ordered, upon consent, that the receiver's balances, after passing his accounts, should, from time to time, be paid to C. and W. on account of their demands.

In 1831, T., an annuitant by deed of 1808, defectively registered, filed his bill for the arrears of his annuity, and made C. and W. parties.

In 1825, N. P., creditors, by judgment of Hilary, 1822 (intervening between the deeds defectively and duly registered), filed an *elegit* bill, making C. and W. parties. T. was not a party to the other causes, nor were N. P. to his cause.

In June, 1836, the receiver of C. and W. was extended to the cause of N. P., and the future rents ordered to be brought in and lodged to the credit of their causes; whereby, the fund now in Court was realised, before the 1st of May, 1838.

In June, 1838, upon consent, in the causes of C., W. and N. P., it was referred to the Master to report the sums due to them respectively, and their priority.

In November, 1838, T. obtained a decree to account, admitting the priority of C. and W.; and in December, 1838, the receiver was extended to his cause. Pending the reference under the decree in this cause, and the order of June, 1838, in the other causes, T. obtained assignments from C. and W. of the mortgage and annuity.

On 11th November, 1839, the Master reported, in T.'s cause, the sum due to him; and that the mortgage and annuity of C. and W. had been assigned to T., and had not been proved. On 12th November, 1839, the Master reported the sums due to N. P.; that C. and W. had filed charges, but declined to prove them; and that the demand of N. P. was prior to the demands for which C. and W. filed their bills. T. now moved, on the report in his favor, that the fund in Court should be extended to his cause, and insisted on his priority. At the same time, N. P. moved that their reported demand should be paid out of the fund, which, they insisted, should, as to T., be considered as by-gone rents, having been collected by their diligence in causes to which T. was no party, and long before T. had obtained a decree or receiver.

Held—That the fund could not be paid out without regard to the priority of T., and that it should accordingly be extended to all the causes. That a fund in Court is never to be considered as by-gone rents, but *in custodia legis* for the persons entitled in priority; and that the rule upon this subject is according to the decisions in *Walker v. Bell*, 2 Mad. R. 21, and *Delany v. Mansfield*, 1 Hog. 234.

Semble—That the principle of the decisions in *Thomas v. Brigstocke*, 4 Russ. 64, *Gressley v. Adderly*, 1 Swanst. 573, and *Brookes v. Greathhead*, 1 Jac. & W. 176, should not be extended, and is applicable only in cases exactly similar. And as to *Sall v. Donagall*, Ll. & G. temp. Sugd. 82,—*quære*.

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£400 per annum for the joint lives of grantor and grantee, and did not state the power of appointment as to the £200 per annum for John's life.

Sir Jeremiah died in 1809, having, in execution of the power already mentioned, by his will, dated the 23d of July, 1808, appointed the said £200 per annum to Jerome Tisdall, the son of the said John, and then an infant only one year old. The deed of 10th July, 1808 was suppressed during the minority of Jerome Tisdall.

In Hilary, 1822, Messrs. Newburgh and Parsons obtained a judgment against the said defendant for £450 and costs.

In 1826, the defendant mortgaged his estate to one Cuffe, and the mortgage was duly registered.

Afterwards, in the same year, one Murtagh obtained a judgment against him.

In 1827, the defendant further charged his estate with an annuity for one White. This deed also was duly registered.

In 1829, Murtagh filed a bill to raise the amount due on foot of his judgment, and obtained a decree and receiver. Soon afterwards, Cuffe and White filed their bills to raise the sums respectively due on foot of the mortgage and annuity granted to them, and had Murtagh's receiver extended to their causes, in neither of which was any decree pronounced.

In 1831, Jerome Tisdall filed his bill, setting forth the deed of 10th July 1808 to Sir Jeremiah Fitzpatrick; the suppression of it during plaintiff's minority; and Sir Jeremiah's will. It prayed that the will might be decreed to be a due execution of the power, and that plaintiff might be decreed entitled, under the said deed and will, to the £200 annuity charged upon the lands for the life of the defendant John Tisdall, and from the time of Sir Jeremiah's death; that an account might be taken of the arrears due to plaintiff, and a receiver appointed to pay them when ascertained, and the future accruing gales. To this bill Murtagh, White, and Cuffe were made parties with the principal defendant, John Tisdall, and several others; but Newburgh and Parsons had not then taken any proceeding on foot of their judgment, and were not noticed.

On the 7th of December, 1833, by consent of the parties in the first three causes, it was ordered, that the balance then in the receiver's hands, as also his future balances, after accounting, should be divided among the plaintiffs in those causes, on account of their several demands.

In 1835, Newburgh and Parsons having sued out an *elegit* on account of the judgment obtained by them, with Samuel Hutchins, who had become entitled for his life to the interest of the principal sum secured by the judgment, filed their bill to raise the amount of their demand, and made Murtagh, White, and Cuffe parties, but omitted Jerome Tisdall, to whose cause the receiver had not as yet been extended.

On the 21st of June, 1836, Newburgh and Parsons obtained an order extending the receiver in the first three causes to their cause (which was accordingly styled *the fourth cause*), and staying any further payments under the consent order of 7th December, 1833.

On the 21st of June, 1838, upon consent of the plaintiffs and defendants in the first four causes, it was referred to the Master, to inquire and report whether any and what sums were due to the plaintiffs in those causes respectively, on account of their several demands, and for costs; and it was further ordered, that the Master should report the priority of the plaintiffs as to such sums as he should report due to them respectively.

On the 21st of November, 1838, Jerome Tisdall's cause (the fifth) was heard on pleadings and proofs, as to the defendants John Tisdall, Cuffe, and White; and upon an order to take the bill as confessed against Murtagh. The deed of 10th July, 1808, having been established, the Court decreed the will of Sir Jeremiah Fitzpatrick to be a due execution of the power created by the deed; and that the plaintiff was entitled to the £200 annuity, to be computed from the death of Sir Jeremiah; and accordingly referred it to the Master to take an account of the arrears of plaintiff's annuity, and also of the sums due to Cuffe and White, whose demands were thereby stated *to be admitted by the plaintiff to be entitled in priority to his*, and also of all incumbrances prior to the deed of 10th July, 1808.

In December, 1838, the receiver in the first four causes was extended to Tisdall's.

Under the order of reference of 21st of June, 1838, the plaintiffs in second, third, and fourth causes went into the Master's office and filed charges, and the plaintiffs in the fourth cause proved their demand; but before White or Cuffe proceeded to prove their registered mortgage and annuity deeds, the plaintiff in the fifth cause opened a negotiation with them, for the purchase of their respective interests in said mortgage and annuity, and succeeded in obtaining assignments thereof.

On the 6th of July 1839, the plaintiffs in the fourth cause applied to this Court, that the Accountant-General might draw in favor of the plaintiff Hutchins, and his co-plaintiffs, Newburgh and Parsons, for the sums of £207. 13s. 10d., and £217. 13s. 11d. (being the amount of their respective demands, which they had proved before the Master, on foot of the judgment), out of the sum of £437. 19s. 7d. cash then in bank, and standing to the credit of the first four causes; and that the Accountant-General might also transfer to their solicitor so much of 3½ per cent. stock standing to the credit of the said causes, as would be equivalent to the sum of £95. 15s. 8d., being the amount of their costs, taxed and certified by the Master. It appeared, by affidavit in support of the motion, that the Master had not as yet made up his

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report under the order of the 21st June, 1838; but that the demands of which payment was now sought had long since been proved and admitted by the Master; and that the delay of the report was caused by Cuffe and White, who had been repeatedly called upon to proceed under the order of reference, and prove their charges. It further appeared, that *the cash and stock then in bank, and standing to the credit of the first four causes, and the balance in the receiver's hands on foot of his last account, and about to be brought in, were the produce of rents received before the 1st of May, 1838.* White and Cuffe resisted the application, and moved that the cash might be invested. Jerome Tisdall also appeared, and resisted the application to draw the money.—The Court refused the application of the plaintiffs in the fourth cause, and ordered that the cash should be invested in stock, &c., and that the Master should proceed effectually under the order of the 21st June, 1838, and make his report thereunder, without regard to any creditor who had filed a charge under the said order, and should not proceed to prove the same.

On the 11th of November, 1839, the Master reported under the decree to account in the fifth cause, and found that there was due to the plaintiff £5,353. 15s. 6d., arrears of the £200 annuity, up to and for the 1st of February, 1839. That pending this cause, and since the decree had been pronounced, White and Cuffe had assigned to the plaintiff all their respective rights and interests in the mortgage and annuity in the pleadings mentioned to have been granted to them respectively; and that the plaintiff had not filed any charge on foot of either the said mortgage or annuity, being satisfied to let the demands so assigned to him remain charged upon the lands.

On the day after the preceding report was obtained, the Master reported, under the orders of the 21st June, 1838, and 6th July, 1839, in the first four causes, that he found nothing due to Murtagh, as no charge had been filed, nor claim made in the office by him; nothing to White, as he did not proceed to prove his charge; nothing to Cuffe, as he did not proceed to prove his charge; and to the plaintiffs in the fourth cause, he found that the sum of £425. 7s. 9d. present currency, was due on foot of their judgment; and £95. 15s. 8d. to their solicitor, Mr. William Gibson, for their taxed costs. He further reported, that the demand of the plaintiffs in the fourth cause was prior to the original demands, for the recovery of which Murtagh, White, and Cuffe had instituted their several suits.

An application was now made on behalf of the plaintiff in the fifth cause, that the stock in bank, and entitled in the Accountant-General's books to the credit of the first four causes, should be extended to the fifth. At the same time, an application was made on behalf of the plaintiffs in the fourth cause—in substance a renewal of their former motion—that out of the stock in bank standing to the credit of the first four causes, the Accountant-General might transfer to them and to their

solicitor the sums reported due to them respectively. Tisdall's motion was grounded upon the decree and report in his cause, and Newburgh and Parsons' upon the orders of 21st June, 1836, 21st June, 1838, 6th July, 1839, the Master's report thereunder, and the affidavit used upon their former motion.

Mr. Collins, Q. C. and Mr. Martley, for the plaintiffs in the fourth cause.

The plaintiffs in the fourth cause are *elegit* creditors by judgment obtained in 1822, and filed an *elegit* bill in 1835, unfortunately a few months before the 5 & 6 W. 4, c. 55, came into operation. Had their proceeding been under that act instead of by bill, the fund now in Court must have been paid out to them long since; as the only persons they should have had to contend with were Murtagh, White, and Cuffe, who were in receipt of the rents, and whose demands were long subsequent to their's. It is clear that if they could have proceeded at law they must have been paid by receipt of the rents now in Court; and their equity is to have the relief which they should have had at law. Tisdall was not a party to any of the first four causes; and the fund in Court was brought in several months before the receiver was extended to his cause, and should have been paid out to the present applicants, but for the irregular delay which he occasioned by his treaty with White and Cuffe pending the reference. It could not have been realised for the payment of Tisdall's demand, which was under an unregistered deed, and must have been postponed to the registered mortgage and registered annuity of Cuffe and White, who were in receipt of the rents. Had he attempted to dispute with them, and oblige either of them to prove his demand; then, by the settled rule of law, all judgments intervening between the conflicting unregistered and registered deeds must have been carried up, and the demands of Newburgh and Parsons should have been unquestionably the first, and Tisdall's last of all: *Latouche v. Dunsaney* (a); *Sparrow v. Cooper* (b). Well knowing this, he made Cuffe and White parties in his cause, and not only admitted their priority, but served upon them special notices of his admission, and had it registered in the very decree by which his right was declared. Had Newburgh and Parsons been made parties in his cause, he could not after such admission dispute their priority. But pending the references in all the causes, and long after the present fund had been realised by the diligence of Newburgh and Parsons, he obtained assignments from White and Cuffe, who were, no doubt, dealt with the more easily by reason of the priority of Newburgh and Parsons; and now his case is, that as neither of the

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(a) 1 Sch. & Lef. 137.

(b) 1 Jones, 72.

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registered deeds subsequent to our judgment has been proved, he is entitled in priority to the fund in Court.

As to the priority thus sought to be established, we should say that it would, under the circumstances of this case, be subject to a serious question even as to future funds; but it could not be maintained to the prejudice of Newburgh and Parsons, as against a fund realised in their cause, by their diligence, and in virtue of their priority—at a time when Tisdall's demand was confessedly puisne and powerless;—and brought in several months before he had either a decree or a receiver in his cause. This case falls exactly within the authority of *Salt v. Donegal* (a). Houlditch's application in that case had a much clearer equity than Tisdall's has in this. There, a trust deed had been executed by Lord Donegal, providing a common estate for all his creditors; and in pursuance of the trusts debentures were issued to the creditors, and amongst others to Salt, Cocker and Houlditch. Salt and Cocker, as such debenture creditors, proceeded to raise their individual demands out of the common trust estate without regard to the other creditors; and in their causes the rents which were the subject matter of Houlditch's application were brought in. Houlditch's bill and his decree were, as well on behalf of all the other creditors as of himself, for execution of the trusts; and his motion was, to stay the proceedings in Salt's and Cocker's causes, and that the rents brought in by them should be transferred to his cause for the benefit of all the creditors who should come in and prove their demands. Sir Edward Sugden having stated his first impression, and having allowed the case to stand for further consideration, decided that so much of the rents as had been brought in after the decree in Houlditch's cause should be transferred to that cause, for the general body of the creditors; but that the portion of the fund which was brought in prior to Houlditch's decree, should be paid to Salt and Cocker, pursuant to the decrees in their respective causes.—[MASTER OF THE ROLLS. That decision is not very clear. I was counsel for Salt upon the motion, and I know that notwithstanding what was said in the judgment, he neither got, nor was ordered, anything but his costs.]—Possibly, between the delivery of the judgment and the making out of the order, something may have occurred to alter the situation of the parties.—[His Honor said it was not so.]—Certainly, Sir Edward Sugden recognized the principle of the decisions which were cited to him upon the motion, and upon all and each of which we rely: *Thomas v. Brigstocke* (b); *Gressley v. Adderly* (c); *Brookes v. Greathead* (d). In both of the judgments which he pronounced in the case, he declared that Salt and Cocker should have all the rents

(a) LL. & G. tem. Sugd. 82.

(c) 1 Swanst. 573.

(b) Russ. 64.

(d) 1 Jac. & W. 176.

brought in prior to the decree in Houlditch's cause.—[MASTER OF THE ROLLS. Did he not say in one part of the judgment,—“before bill filed?”]—No; he said “before decree;” and for this reason, that but for Salt's and Cocker's proceedings Lord Donegal may have been taking the rents until the receiver was appointed in Houlditch's cause; and that if those rents had passed into the hands of Lord Donegal, Houlditch would have been without a remedy. “The individual creditors,” he said, “by their proceedings have prevented this, and, therefore, have “a right to the fruits of their diligence.”

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Mr. Warren, Q. C., Mr. Keatinge, Q. C., and Mr. Patrick Blake, for the plaintiff in the fifth cause.

The question here is, whether the fund in Court is to be paid out without regard to priority?

The doctrine of by-gone rents is inapplicable to the present case: it is properly applicable only as between mortgagee and mortgagor, and has not been extended beyond mortgage cases, such as those cited upon the other side, in which puisne incumbrancers intervened, and by their diligence brought in rents which should otherwise have gone into the pocket of the mortgagor. It is even doubtful that in any case the doctrine should now be extended to a fund in Court; as it has been expressly ruled by later decisions, that a fund in Court, or in the hands of a receiver of the Court, is *in custodia legis*, for the person who can shew the best title to it. In *Delany v. Mansfield* (a), the cases of *Thomas v. Brigstocke*, and *Grassley v. Adderly* were cited, and the late Master of the Rolls said “Any argument which treats rents in the “hands of a receiver as if paid to the plaintiff, is quite unfounded, and “subversive of the rights of prior creditors. If money as soon as “collected by a receiver is to be considered as the property of the “plaintiff, every inquiry in a decree as to prior incumbrances must be “to a great extent useless.”

But in the present case, Tisdall, the prior creditor, has a superior title to that of a mortgagee: his annuity was a specific incumbrance—an appropriation to him of so much of the rents, to which the doctrine of by-gone rents is totally inapplicable. His delay was not of his own choosing or by his negligence, but by the fraud practised and continued against him through the whole term of his minority—which first kept him in ignorance of his rights, and afterwards rendered the proofs of them difficult and tedious. It has been expressly decided as to a fund in Court, that rents are to be considered as attached from the time of filing the bill: *Bland v. Gould* (b); and Tisdall's bill was filed four years before Newburgh and Parsons filed theirs; and his cause is now in the

(a) 1 Hog. 234.

(b) *Ante*, Vol. 1, 5.

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Lord Chancellor's list, and will be heard upon report and merits in a day or two, when, of course, he will obtain a final decree, pursuant to the Master's report. Again, in *Thomas v. Brigstocke*, and that class of cases, the puisne creditor was declared entitled to the fund, for this reason, that if it had not been so realised by him, it must have gone into the pocket of the debtor, who, in such case, would not have been liable to account. What Sir Edward Sugden is reported to have said, in *Salt v. Donegal*, was based expressly upon that ground; but in this case, it is plain that not one penny of the fund in Court could have passed into the pocket of the debtor; it was going in a course of administration in payment of debts when, by the interference of Newburgh and Parsons, it was arrested and brought into Court, for no other possible reason than that it should be subject to priority. Therefore, even if the decisions cited upon the other side should be admitted in their fullest extent, they could not touch this case, which clearly comes within the rule laid down in *Walker v. Bell*(a), *Delany v. Mansfield*(b), and *Weekes v. Mellifont*(c).

Upon the other side, much reliance has been set upon the alleged fact, that Tisdall could not have disputed the priority of either White or Cuffe, though their demands were puisne to those of Newburgh and Parsons. It is true, he thought it more advisable to avoid any such dispute; but there can be no objection to the course he has adopted; nor have Newburgh and Parsons any case of hardship to complain of. White and Cuffe, who were in receipt of the rents in payment of their demands, had as clear an abstract right to be paid as Newburgh and Parsons had; but the latter arrested the fund to be subject to the equitable principle—"Priority is Equity." Under that rule, Tisdall has the first right, as his annuity deed is prior by nearly twenty years to the other securities; and if, in consequence of a defect in the registration of the deed under which he claims, he should, by a technical rule of law, have lost his equitable priority, in the event of his demand conflicting with subsequent registered incumbrances, there could be no objection to his purchasing such subsequent incumbrances, and thereby preventing the possibility of conflict. He has thus, at a heavy cost, obtained no undue advantage, but merely avoided a very serious loss. If, however, there be any question still remaining upon this point, he is willing to discuss it. His application is, not that the fund shall now be paid out to him, but that it shall not be paid out to others without regard to his rights.

MASTER OF THE ROLLS.—I should wish, before I give my judgment in this case, to have some further information respecting *Salt v. Donegal*,

(a) 2 Mad. R. 21.

(b) 1 Hog. 234.

(c) 6 Law Rec. N. S. 387.

as I think there must be some mistake in the report. In the second judgment, p. 98, it is said: "*Before the bill was filed in Ireland by Houlditch, the other creditors, through the medium of receivers, proceeded to obtain the rents for their own benefit; and between 1832 and 1834, realised a fund amounting to about £5000. Can the individual creditors now be called on to refund this sum?*" From this it would seem as if Sir Edward Sugden thought that the rents should be considered as attached from the time of filing the bill; and when I look at the order, I find the fund transferred to Houlditch's cause, and, as I have already observed, that Salt gets nothing but his costs. If the dates given in the statement of the case in the report be correct, it must be very difficult to understand the judgment; because it is stated that the receiver was originally appointed in Cocker's cause, in May, 1832, and extended to Salt's cause in July, 1832; that Houlditch filed his bill in Ireland in December, 1828, and brought his cause to a hearing, before Lord Plunket, on the 23d of January, 1832.* Probably there is some inaccuracy in the statement of dates, or perhaps there may have been some other facts in the case, not stated in the report, which would remove or ex-

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* His Honor's attention was not called to the fact, that in *Salt v. Donegal*, the motion was debated on the *assumption*, that the fund in Court had been realized in Salt's and Cocker's causes, *before* Houlditch obtained a decree or receiver. The view of the case presented to Sir Edward Sugden had little or no regard to the precise dates of the proceedings in the several causes; and it is in the highest degree probable that several of those dates, which, after the unexpected decision as to the equitable effect of the decrees of the House of Lords, appeared of the utmost importance, and now give to the judgment the semblance of inconsistency,—*v. g.* the dates of the appointment of the receivers in Salt's and Cocker's causes—were not mentioned at all. No doubt, having regard to the dates, the decision, that the decree of the Lords should have effect as if it had been the decree pronounced by Lord Plunket upon the hearing of Houlditch's cause, disposed of the whole fund in Court; as it referred the decree of the Lords to a period prior, by several months, to the appointment of the receivers in Salt's and Cocker's causes. But, the materiality of the dates did not appear until *after* that decision; and it can scarcely be a matter of surprise, if, under the circumstances of the previous discussion, they were not very accurately impressed upon Sir Edward Sugden's mind; or if—as Salt's and Cocker's causes were of old standing and far advanced—he supposed that the receipt of the rents, of which the fund in Court was the produce, included a period prior to the constructional date of the decree in Houlditch's cause, and that the fund was therefore to be considered as consisting of two distinct classes of rents, the one received before that decree, and the other after. Of course, "Salt got nothing but his costs;" because the fact was (though Sir Edward Sugden, when pronouncing his judgment, did not know it), that the receiver in his cause was not appointed for several months after the period from which it was decided the decree in Houlditch's cause should have effect; and it seems of very little consequence whether the intention of the order was, that it should, as in the case above reported, be subject to a reference; or whether, as seems most likely, after Sir Edward Sugden had pronounced his judgment, he was apprised of the dates, and that his order need not have regard to rents received *before* the decree in Houlditch's cause, as by the effect of the decision on the other point, there were no such rents. But it should be observed, that the inaccuracy as to the dates did not in the least prejudice the adjudication upon the rights of the parties before the Court, and merely led to the examination of a question—the only one as to the fund in Court which was discussed by the counsel, or which could have admitted of discussion—*viz.*, as to rents received *before* the decree in Houlditch's cause. As the question did not properly arise, the judgment upon it may be considered as extra-judicial, and so far questionable as an authority; but it must be regarded as Sir Edward Sugden's deliberate opinion; for the reporter is authorised by Messrs. Lloyd and Goold to state, that the two judgments in the case, as reported, were revised and corrected before their publication, by Sir Edward Sugden himself.

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plain what at present appears to be the inconsistency between the facts as stated, and the judgment; and again, between the judgment and the order. I remember that Mr. *J. Henn* was in the case, and took a note of it; perhaps, if he was applied to, he would remove all difficulty respecting it.

Mr. *Collins* said he would communicate with Mr. *Henn*, and apprise the Court of the result.

The case was then ordered to stand.

Wednesday, November 27th.

Mr. *Collins* now stated to the Court that he had communicated with Mr. *J. Henn* respecting the application in *Salt v. Donegal*; that Mr. *Henn* had very full notes of the case, and upon reference to them, it appeared that the dates of the several proceedings in *Salt's*, *Cocker's*, and *Houlditch's* causes were correctly given in the report.

His HONOR said, that, the fact being so, he could not see that the decision applied to the case now before the Court, except as to the question of costs.

Some further discussion ensued, the substance of which has been already stated.

Saturday, November 30th.

THE MASTER OF THE ROLLS now delivered his judgment, as follows:

In *Murtagh v. Tisdall*, and four other causes, there were, some days ago, two conflicting applications respecting a fund in Court, which stood for consideration, and are now to be disposed of.

It appears that the first of these causes was instituted in the year 1829, to raise the sum due on foot of a judgment; the second in 1830, for the arrears of an annuity granted in 1827; the third in 1830, to foreclose a mortgage of 1826; the fourth in 1835, for the amount due upon a judgment obtained in 1822, and upon which the plaintiffs sued out an *elegit*; and the fifth in 1831, for the arrears of an annuity granted by deed of 1808. The plaintiffs in the three first causes are defendants in the fourth and fifth; but the plaintiffs in the fourth and fifth appear only in their respective causes.

On the 21st of June, 1836, the plaintiffs in the fourth cause obtained an order, by which the receiver who had been appointed in the first cause, and extended to the second and third, was further extended to their cause, and the future rents were directed to be brought in and lodged to the credit of the first four causes. Under that order, the fund now in Court was realised by receipt of the rents during the time intervening between June 1836, and the 1st of May, 1838.

On the 21st of June, 1838, by consent in the first four causes, it was referred to the Master to inquire and report the sums due to the plaintiffs in those causes respectively, and their priority; and on the 12th of November, 1839, the Master reported the sums due to Messrs. Newburgh and Parsons, the plaintiffs in the fourth cause, on foot of the judgment obtained by them in Hilary 1822; and that their demand is prior to the several demands for which the three first causes were instituted. Upon this report, Messrs. Newburgh and Parsons have moved that their demand may now be paid out of the fund in Court. Upon the other hand, the plaintiff in the fifth cause, whose demand is under a deed executed so long back as the year 1808, and whose bill was filed nearly four years before Newburgh and Parsons filed theirs; had the receiver extended to his cause in December, 1838; and the Master's report of the sums due to him on the 11th of November, 1839; and (as I now learn) a final decree pursuant to the report pending this motion. He applies that the fund in Court, to the credit of the first four causes, may be extended to his cause, and insists upon the priority of his demand.

The only question I have at present to decide between the parties is,—whether or not, under the circumstances, the plaintiffs in the fourth cause are entitled to be paid out of the fund in Court, without regard to priority as between them and the plaintiff in the fifth cause? It is said, that as this fund was realized by the diligence of Newburgh and Parsons in their cause, to which Tisdall was not a party, and was brought in several months before he obtained a receiver, it should be considered in their favor as by-gone rents, not subject to his rights.

In *Salt v. Donegal*, the fund was realised in Salt's and Cocker's causes, by receipt of the rents in the interval between the dismissal of Houlditch's bill in 1832, and the judgment of the House of Lords in Houlditch's favour in 1834. Sir Edward Sugden decided that the judgment of the House of Lords in 1834, should, as far as possible, have effect as if it had been the decree pronounced by Lord Plunket in 1832. That was in fact deciding the whole question in the case; and accordingly, the order was that the costs incurred by Salt and Cocker in their respective causes, should, when taxed and ascertained, be paid to them out of the fund, and that the balance then remaining should be transferred to Houlditch's cause:—*i. e.*—that the fund realized for particular demands before either a decree or receiver was obtained in the general creditor cause, should be transferred to that cause, to be subject to the equities of all the creditors.* It is, no doubt, true, that there are parts of the judgment, as reported, which seem to recognise a different principle, and are scarcely reconcilable with the order. I have already adverted

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* See note, *ante*, p. 49.

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to the passage at p. 96, where it is said, "Before the bill was filed in Ireland by Houlditch, the other creditors, through the medium of receivers, proceeded to obtain the rents for their own benefit, and "between 1832 and 1834, realized a fund amounting to about £5000. Can the individual creditors now be called on to refund this sum?" There are several others to the same effect, and alike inconsistent with the facts of the case and the order made upon it. Possibly, Sir Edward Sugden was under the impression that beside the fund in Court, other funds had been realized in Salt's and Cocker's causes, which under some previous orders upon consent or otherwise had been paid out to them; and that Houlditch sought not only that the fund in Court should be transferred, but that the sums already received should be refunded. At any rate, the order is the authority to which I must look; especially, as the passages in the judgment which seem to be inconsistent with it cannot be accounted for, except by supposing that Sir Edward Sugden was under a mistake respecting some of the material facts in the case. I think, the decision amounts to no more than this, that where individuals of a class entitled to a common trust fund, institute proceedings exclusively for their own demands, and in their causes bring in a portion of the rents of the trust estate, they shall be allowed their costs incurred in realizing the fund; but the Court, being apprised of the other demands and being applied to on their behalf, will administer the fund according to the rights of all the creditors entitled.

In *Walker v. Bell*, and *Delany v. Mansfield*, it was expressly decided that a fund in Court is *in custodia legis* for the person entitled in priority, and never to be considered as by-gone rents already paid out to the party who may happen to have realized it. On the other hand, it is urged that certain exceptions to this general rule have been established by the decisions in *Thomas v. Brigstock*, *Gressly v. Adderly*, and *Brookes v. Greathead*. I think the principle of those decisions should not be extended, and that it is inapplicable to the state of facts now before the Court. In my opinion, *Walker v. Bell*, and *Delany v. Mansfield* established the proper rule, which has been carried to its fullest extent by the course of modern decisions: * *Gillespie v. Alexander* (a); *Sawyer v. Birchmore* (b); *David v. Frowd* (c); *Greig v. Somerville* (d); *Angel v. Haddon* (e); Lord Redesdale's judgment in *Largan v. Bowen* (f).

(a) 3 Russ. 736.

(c) 1 My. & Kee. 200.

(e) 1 Mad. 529.

(b) 1 Keen. 400.

(d) 1 Russ. & My. 338.

(f) 1 Sch. & Lef. 298.

* To the cases above cited by the Master of the Rolls, may be added his Honor's own decisions in *Otway v. Nestor*, *Hirch v. Alt*, *Hackett v. Donnelly*, and *Kelly v. Kelly*: Ante. vol. 1, pp. 228, 231, 321. In *Kelly v. Kelly*, the original application of Waldron the prior creditor has not been specially reported; but the facts were shortly stated by his Honor when pronouncing judgment as to costs at a subsequent stage, (Ante. vol. 1,

I give no opinion upon the question which was mentioned but not discussed upon this motion, viz.: Whether or not, in the events that have happened, Tisdall's priority should be disallowed in consequence of the defect in the registration of the deed under which he claims (a). If Messrs. Newburgh and Parsons wish to discuss that question, they shall have a full opportunity of doing so before the fund is paid out: they can have, if they please it, a reference to the Master to settle priority as between them and Tisdall. But as the case now stands, Mr. Tisdall appears as a prior creditor, having a final decree in his favor, and whose bill was filed long prior to that of Messrs. Newburgh and Parsons. I, therefore, think the fund in Court should be extended to his cause; and that it should not be paid out without regard to his rights. But following the principle of Sir Edward Sugden's decision in *Salt v. Donegal*, I shall give Messrs. Newburgh and Parsons the costs incurred by them in their cause, and of this motion.

ORDER:—Let the Accountant General draw in favor of Mr.

William Gibson, solicitor for the plaintiffs in the fourth cause, for the sum of £95. 15s. 8d., being the amount of taxed costs of the plaintiffs in said fourth cause, found by the report bearing date the 12th of November, 1839, to be due to him; and for the sum of £27. 10s. for the costs of this application, and the costs incurred since the 25th of June, 1839, making together the sum of £123. 5s. 8d.; and let the residue of the funds standing to the credit of the first four causes be transferred to the credit of all the causes.

(a) See *Purdon v Gumbleton*, Wallis' R. by Lyne, 249.

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p. 321); and some other particulars of it are mentioned in the introduction to the case in 6 Law. Rec. N. S. 222. From those cases it appears that even after an allocating order, and down to the very moment when the fund is paid out of Court, it is liable to the demands of any prior creditor, who comes in and applies against it. However in those cases, although the puisne creditor complained of losing a fund, brought in by his exertions, or already ordered to him in payment of his demand, it could not be denied, that if it had not been brought in by him, it would have been applicable to the demand of the prior creditor; that, what had been done merely altered its situation, without altering its liabilities; and therefore, while in the power of the Court, it was held subject to priority. But whether priority can count against a fund which it could not have realized? Whether by depriving a puisne creditor of the fruits of his diligence, a prior creditor should be put in a better situation than he could have been in, and obtain a fund he never could have had, if the puisne creditor had never interfered? Quære.

Thursday, November 14th.

MINOR'S ESTATE—COSTS OF REFERENCE.

WILLIAM J. CAMPBELL, a Minor, by R. SMITH, his Next Friend,
v. ROBERT B. BRYAN.

Where the tenant of a minor's estate obtained the common order of reference, as to renewal of the lease under which he held, and the order directed, *inter alia*, that the minor's costs of the reference should be paid by the tenant: upon the reference, the guardian of the minor insisted that the tenant was not entitled to a renewal without payment of renewal fines, and a protracted litigation ensued, whereby the costs of the reference were trebled on both sides; and it appeared that the tenant was entitled to renewal without fine, and that he had been paying in his own wrong for several years, on account of renewal fines, sums amounting to £300:—The Court, under the circumstances, ordered that the guardian should execute the renewal, without requiring payment of the costs of the reference.

On petition of James Bashford, a tenant of part of the minor's estate, the Lord Chancellor made an order, bearing date the 7th December, 1837, referring it to the Master, to inquire and report whether a certain lease, bearing date the 23d of August, 1794, contained any, and what covenant or agreement, binding on the minor, to renew the said lease, pursuant to the statute (1 W. 4, c. 65, extended to Ireland by the 5 & 6 W. 4, c. 17): and if so, that the said Master should report who was entitled to such renewal; and also, the sums due for renewal fines, &c. if any, to the last gale day preceding the report. And it was further ordered, that the Master should settle the deed of renewal, and that on payment of the sums which should be reported due to the guardian of the fortune of the said minor, for renewal fines, if any, &c., and *all costs of the said minor of this reference*, and upon performance of the other usual conditions, the guardian of the minor should be at liberty to execute the deed of renewal in the name of said minor.

The estate of the minor was under a lease for lives renewable for ever, made to his father, by whom the lease of 23d of August, 1794, being an under-lease, was made to the father of the petitioner for the same lives as in the original lease, and with covenant for perpetual renewal. The renewal of the head lease was subject to the payment of certain renewal fines; but in the under-lease, the covenant was for renewal without fine. The petitioner derived his interest in the lease of 23d of August, 1794, under the will of his father, and was a minor at, and for several years after, the period of his father's death. In the year 1814, during the petitioner's minority, his mother obtained a renewal, upon payment of a certain contribution for renewal fines, and the several subsequent renewals omitted the covenant as to renewal without fine. Since the petitioner obtained his age, in the year 1820, he paid, from time to time, up to and for the 1st of November, 1831, by way of contribution for renewal fines, certain sums, amounting altogether to £300. He lately discovered, that under the original lease of 23d of August, 1794, he was entitled to renewal of the lease without fine; and upon the reference insisted he was so entitled, and that his former payments had been made by him in ignorance and in his own wrong. On the other hand, the guardian of the minor admitted the petitioner's right to a renewal, upon payment of one half of the renewal fines payable by the minor, but insisted that he was not entitled otherwise; and as evi-

dence of the minor's right to contribution for renewal fines, relied upon the conduct of the parties since the year 1814, and also the following memorandum, in the hand-writing of John Campbell, the minor's father, which appeared to have been made in the year 1813 :—"By award of John Page, Esq., and by agreement with Mr. Bashford, in 1808, he "and his assigns are to pay one-half of the fine at every renewal." Under direction of the Master, a charge and discharge were filed, personal interrogatories were exhibited to the petitioner, who answered, denying any such award or agreement as stated in the memorandum. Several witnesses were examined, and, among others, Mr. Page, who was mentioned in the memorandum, and who had no recollection of the award alluded to; and the plaintiff having failed to prove any such agreement or award as mentioned in the memorandum, after a protracted reference, the Master reported the petitioner entitled to a renewal without fine. The plaintiff excepted to the Master's report, and thus brought the question before the Court on 23d of May last, when the exceptions were overruled, and the Master's report confirmed.

The draft renewal having been accordingly prepared, and approved by the Master and the plaintiff's counsel, the plaintiff's solicitor furnished to the petitioner his bill of the minor's costs of the reference, amounting to £83. 6s. 10d. The petitioner's costs of the reference amounted to £100; and it appeared that nearly two thirds of the costs on both sides were occasioned by the claim set up by the minor for renewal fines. The guardian refused to execute the deed until the minor's costs of the reference should be paid by the petitioner, pursuant to the order of reference.

Mr. *Tomb*, for the petitioner, now moved that the order of reference might be varied, by expunging so much thereof as directed payment by petitioner of "all costs of the said minor of the reference;" or that the petitioner might be at liberty to set off against such costs, the amount paid by him from time to time to the receiver of the said minor, as and for renewal fines, from the 17th day of May, 1820, up to and for the 1st of November, 1831; and inasmuch as the amount paid by the petitioner exceeded the amount of the minor's costs of said reference; that the guardian of the said minor should be directed to execute the renewal approved of, as in the said order of reference specified, without the payment by the petitioner of any costs of said minor of said reference; or for such other order, &c.

Sergeant *Curry*, and Mr. *Major*, Q. C., *contra*, submitted that, under the circumstances, the guardian of the minor had done no more than his duty in raising the question as to the minor's right to contribution for renewal fines; and that the order directing the minor's costs of the refe-

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rence to be paid, before the tenant should be entitled to a renewal, was according to the settled practice in such cases, and should not be varied.

MASTER OF THE ROLLS.

As the order of reference in this case was made by the Lord Chancellor, I at first doubted that I could entertain the present application, because I could not vary his Lordship's order. However, as this is not an order involving a special decision of his Lordship, but the common one generally applicable to references obtained by the tenants of a minor's estate; and as I am satisfied that it was not intended to govern such a state of facts as the reference in this case has disclosed, as to which, I think, there can be no doubt, I believe I may venture to dispose of the present application; and that it is not necessary, on the point of form, to give his Lordship the trouble of hearing it.

As a general rule, the Court will not allow a minor's estate to be burdened with the costs of references sought by persons claiming under or against that estate; and usually makes it, as in the present case, one of the conditions of granting such reference, that the minor's costs of it shall be paid by the petitioner. The minor's inability to protect himself is no reason why undue advantage should be taken of him, nor why his estate should pay for the litigation of other people; and the rule was intended to protect him against such imposition. But it must not be carried beyond its principle. Equity to one, cannot be injustice to others.

In the present case, a tenant of the minor's estate proceeded upon a reference to obtain a renewal of his lease, pursuant to a covenant for that purpose. It appears that he is entitled to a renewal without fine; and that by the attempted resistance on behalf of the minor to this right, the tenant's costs of the reference were increased to the large sum of £100, and the minor's costs to £83. Two-thirds of the costs on both sides were occasioned by resistance to a right which the tenant has established; and in the course of the protracted litigation which ensued, and which the order of reference never could have contemplated, it appeared that the tenant was not only entitled to a renewal without fine, but also, that he had for several years been paying, in his own wrong, to the minor, sums amounting altogether to about £300, on account of renewal fines. I cannot order back to him the sums he has been paying in ignorance, nor give him any portion of the costs to which he has been put in supporting his claim; and now that his right is established, am I to withhold it from him, until he pays the costs of the opposition which has been given to it? In my opinion, it would be grievous injustice to do so. In saying this, I do not mean to impute any blame to the other side; I think, under all the circumstances, the guardian of the minor has not acted unreasonably; and that the course he has taken was probably one which

the minor, if an adult, might himself have adopted in the fair exercise of his discretion. It seems to have been a *bona fide* proceeding on behalf of the minor, which has failed; and as this failure escapes the usual incident of liability to the costs incurred on the other side, I think the minor's estate may very well bear his own costs of an unsuccessful opposition on his behalf.

ORDER:—The Court doth declare, that it is not reasonable or just that the said James Bashford should, under all the circumstances of the case which have appeared since the order of reference was pronounced, pay the minor's costs of the reference under the said order, bearing date the 7th of December, 1837: therefore, let the guardian of said minor plaintiff be at liberty to execute a renewal of said lease, bearing date the 23d of August, 1794, to the said J. Bashford, on payment of all rent, but without requiring payment from the said J. Bashford of the costs of the reference under the said order; and let him be at liberty to charge such costs as were properly and necessarily incurred by him, as guardian, under said order of reference, as part of his costs in this cause.

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Thursday, November 28th.

MOTION TO DISMISS—AMENDMENT OF BILL.

54TH AND 93D RULES (Nov. 1834).

DYCERS v. GOLDING and another.

Mr. WILLIAM SMITH, on the part of the defendant Golding, moved to dismiss the bill, with costs, for want of prosecution. The defendant Golding's answer was filed on the 15th April, 1839, and the co-defendant's answer was filed on the 6th June last, since which time there had been no proceedings on the part of the plaintiff.

A bill may be amended without order once after answer, and after notice of motion to dismiss the bill for want of prosecution. But such amendment, after notice of motion to dismiss, served, is not cause against the motion to dismiss.

The plaintiff's solicitor stated that an amended bill had been just filed, and that a compromise had been on foot.

The MASTER OF THE ROLLS directed the motion to stand over, and plaintiff's solicitor to make such affidavit as he might be advised.

Saturday, November 30th.

Mr. W. Smith renewed his application to dismiss the bill; and also moved, pursuant to a further notice, that the amended bill might be

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Mr. *Hawkins*, for the plaintiff, relied on the affidavit of the plaintiff's solicitor, which stated that the bill had been filed to foreclose a mortgage, executed by the defendant *White* to the father of the minor plaintiffs; that *Golding* was made a party in respect of certain prior judgments vested in him; that the said solicitor was concerned for both defendants; and that in the course of last vacation, the plaintiff's solicitor had several conversations with defendant *White*, who stated that he was endeavoring to raise money to pay off the mortgage, and begged of deponent not to incur further expense. That in consequence of those conversations, the cause had not been pressed on.—The plaintiff had been advised to amend his bill, by adding parties and putting further facts in issue; and it was submitted, that he was entitled to amend in this case once after answer, without order, pursuant to the 54th General Rule of November, 1834.

Mr. *W. Smith*, in reply.—The amendment of the bill, after notice of motion to dismiss, is no cause against the motion.* *Swinfen v. Swinfen (a)*. This case should be considered as if the plaintiff now came in on cross notice for liberty to amend; and, in such case, he should, under the 57th New Rule, shew by affidavit the reason why the amendments were not before introduced. In the present case, the occasion for the amendment now sought arose from objections for want of parties, raised by the defendant's answer, filed so long since as April last. The allegation in the affidavit of plaintiff's solicitor, as to the casual conversations with the defendant *White*, are vague, and ought not to be attended to. The plaintiff was irregular in filing this amended bill after service of notice of the motion to dismiss. Although the 54th New Rule declares that the plaintiff shall be at liberty to make one amendment, at any time after answer, and before replication, that must be subject to some qualification. In *Stewart v. Service (b)*, the Chancellor said: "If a case should arise, in which the plaintiff shall abuse this right to amend, the Court has power to interpose, to prevent him making 'an undue use of it.'" The intention of the 54th New Rule seems to have been, to enable the plaintiff to do, without an order, what previously required a side-bar rule, and was probably not intended to apply to cases in which, under the old practice, a special order was necessary. According to the old practice, under the Orders of 24th Feb.

(a) 3 Sim. 384.

(b) 1 Ll. & G. temp. Plunket, 303.

* See, also, *Mitchell v. Deuall*, 1 Hog. 256.

1737, and 5th March, 1752,* there was the entry and service of a side-bar rule to dismiss the bill; and unless a replication was filed, or special cause shewn within four days after service, the bill was dismissed without further order. Under the New Rules, the bill is dismissed at once, by motion upon notice, the notice being substituted for the old conditional rule, and, in effect, a demand on the party to shew cause, on the motion, why the bill should not stand dismissed.† Under the old practice, a bill could not be amended by a side-bar rule after service of a conditional order to dismiss. *Molony v. Molony*(a); *Butler v. Mahon*(b). Therefore, it would seem, that amendment cannot now be made as of course, after notice of a motion to dismiss the bill. Although in the present case, the plaintiffs were aware of the required amendment so far back as last June, they never stirred until after the notice of the present motion, and then, as of course, they filed an amended bill of eleven skins of parchment.

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MASTER OF THE ROLLS.

The amendment of the bill, after notice of this motion, is not cause against the motion; but, under the circumstances stated in the affidavit of the plaintiff's solicitor, I will not dismiss the bill. It appears that there have been some communications between the plaintiff's solicitor and the defendant White, which induced the plaintiffs to delay the prosecution of their suit; and that the defendant, who now seeks to have the bill dismissed for want of prosecution, is represented by the same solicitor who is concerned in this cause for the defendant White; so that the defendant now applying may be supposed to have been apprised of the not unreasonable cause of the delay. I have frequently had occasion to notice the evil effects of permitting vague and casual conversations pending a cause to interrupt the regularity of the proceedings in it: however, the Court is always unwilling to dismiss a bill for want of prosecution, where there is a reasonable excuse for the delay; and, under the circumstances now disclosed to the Court, I think the plaintiff should be at liberty to retain the bill, upon the usual terms of paying the costs of the motion to dismiss it. On the other hand, the application that the amended bill may be taken off the file for irregularity, must be refused, with costs. If the amended bill be objectionable for prolixity, or as varying the case already made, it may be dealt with in another way, either by reference, or perhaps by motion as to the costs of the former bill.

(a) 1 Hog. 117.

(b) 1 Hog. 90.

* Smith's Orders in Chancery, App. 108, 112.

† See his Honor's judgment in *Grace v. Reed*, 6 Law Rec. N. S. 213-14. See also, as to amendment after notice of motion, *Gouthwaite v. Ripon*, 1 Beav. 54.

EQUITY EXCHEQUER.

*Monday, May 13th.*PROLIXITY—PLEADING—ANSWER—SCHEDULE—
INTERROGATORY—INJUNCTION—REPORT—
PRACTICE.

BARRY v. HARRISON.*

An answer setting forth in *hæc verba* documents, which are not set forth in compliance with any requisition in the bill, nor shewn by the answer to be material to the defendant's case is prolix, even though the bill pray for an injunction, and the documents may be, in point of fact, material to the defendant's case.

When a bill praying for an injunction required the defendant to set forth, in a schedule to his answer, a full, true, and particular account of all and singular the goods, chattels, &c., and property of every nature and description of which

A. B. died possessed, &c.; specifying the nature, amounts, particulars, items, and descriptions thereof, whether in monies, &c.; and specifying, *item by item*, of what the same consisted, &c.; and the quantity, quality, and value thereof, and every part thereof, &c.—*Held*, that a very long schedule to the answer, setting forth, with the utmost minuteness of detail, the particulars and amount of the property, was not prolix, this mode of answering having been induced by the minute and searching nature of the interrogatory.

Practice—Motion to send back report.

THE bill in this case was filed for an injunction to restrain the defendant, Robert Harrison, from proceeding further at law against the plaintiff, for the recovery of the sum of £1000, and interest, on foot of certain promissory notes in the bill mentioned.

The bill stated a variety of matters growing out of and connected with certain agreements and dealings between the plaintiff and the defendant, and one Charles Cooksey Yates. The defendant's right to recover, on foot of the notes, was resisted by the plaintiff upon several grounds, and, amongst others, upon the ground that no debt was due by the plaintiff to Yates, in right of whom the plaintiff derived his claim.

It appeared that Yates died on the coast of Africa, in the month of August, 1837.

The bill charged that certain bills of exchange, which formed the consideration of the notes in question, were renewals of certain other bills drawn by Yates on the plaintiff. It further charged, that Harrison was not a holder of these bills for value, but merely as a depositary for Yates; and that even if he was a holder for value, he had received property of Yates to an amount more than sufficient to pay any debt due to him, and which property formed, as it was alleged, the primary fund for the payment of the securities in question.

The bill prayed an injunction, and also an account of the assets of the said Yates.

An injunction having been obtained in the usual course, the plaintiff procured an order to refer the defendant's answer, for prolixity, and the remembrancer reported it prolix in several passages.

* This and the two following cases were decided in Trinity Term.

The plaintiff, however, being dissatisfied with the report, an application was now made, on his behalf, that it should be sent back to the Remembrancer, with directions to report the answer prolix, in several other passages specified in the notice of the motion.

On the part of the defendant, a preliminary objection was taken to this application, upon the ground that the plaintiff's proper course was, to have taken exceptions to the Officer's report, instead of moving to have it sent back, to be reviewed by him.

In support of the objection, *Howard's Equity Exchequer*, 710, and the case of *Lord Houth v. Nugent*, *id.* 712, were referred to.—[PEN-FATHER, B.* The Remembrancer has signed this as an interlocutory report. Sometimes, he signs a draft report, and gives directions that it shall be served on the parties; and unless objections be taken to it within four running days, it is then signed as a final report. But sometimes (as in the present case), he treats it as an interlocutory report, and as one that ought to be conclusive. In the latter case, no objections can be taken to the report, and the party has no other way of questioning the decision of the Officer, than by moving to have the report set aside, or sent back to be reviewed. The proper mode of proceeding in this case was, therefore, by motion.]

Amongst other passages now insisted on as prolix, in addition to those already found to be so by the report, were three, in which the defendant had set forth, at length, copies of certain letters, written by himself. These letters were referred to by the plaintiff, as corroborative of certain statements in the bill, and were charged to be in the plaintiff's own possession. Although thus put in issue by the bill, they were not particularly interrogated to, or required to be set forth in the answer, nor were they referred to by the answer as evidence of any statement contained therein.

Sergeant *Greene* and Mr. *Blake*, Q. C., on the part of the plaintiff, contended that this mode of setting out the letters rendered the answer prolix, as there was no interrogatory in the bill, that required them to be set forth in *hæc verba*, and no statement in the answer referring them to any particular line of defence. The rule in such cases is, that the party should state the particular facts he intends to prove, and then refer to the documentary evidence in support of that statement, but in no case should he set out the documents themselves, in his answer, unless called on to do so by the bill; *Beaumont v. Beaumont* (a); *Alsager v. Johnson* (b); and *King v. Teale* (c).

Mr. *Lane* and Mr. *F. W. Walshe*, for the defendant, urged that these letters formed part of the defendant's case, and were most material for

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(a) 5 Mad. 51.

(b) 4 Ves. 217.

(c) 7 Price, 278.

* Solus.

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the purposes of the motion to dissolve the injunction. They submitted, therefore, that they did not render the answer prolix : and stated, that it was upon these grounds that the Officer had refused to include them in his report of prolixity. *Lowe v. Williams* (a).

PENNEFATHER, B.—It does not appear to me that there is any thing in the bill requiring these letters to be set forth. They are merely evidence of a particular state of facts ; and in order to render them admissible as such, the answer ought to contain some averment shewing them to be material to support that particular state of facts. It is true, as it has been observed by the plaintiff's counsel, that a party, after stating the facts on which he means to rely, should then refer to the necessary documents to sustain that statement. But when the bill prays an injunction, he may not only state the facts on which he means to rely, but may also set out the documents which are the evidence of those facts ; for, otherwise, it might be objected, when the defendant came to dissolve the injunction, that the documents used upon the injunction motion, were not those referred to and verified by the answer. It is, therefore, going too far to say, that in no case should a party set forth the documents in his answer. In equity pleading, it is not enough merely to set out the evidence, but a party is bound to introduce it by a proper statement. The rule of pleading, both at law and in equity, is, that a party must succeed *secundum allegata* as well as *probata* ; he must, therefore, in the first place, allege what he proposes afterwards to prove. The defendant seems to have set out these letters as if they had been called for by the bill, and not as if they formed part of his own case. I do not mean to say that they may not be material to the defendant's case, but they ought to have been shewn by the answer to be so. I cannot find any thing that would justify him in setting out these letters in the manner in which he has done, the bill not containing any interrogatory requiring him to do so, and the answer not containing any statement of their being conducive to the defence. I must, therefore, upon this part of the case, however reluctantly, differ in opinion with the Officer, and send back the report to be reviewed in the particular passages which form the subject of the present objection.

Another of the passages objected to as prolix, was a schedule purporting to be an answer to the following interrogatory, in reference to the assets of Yates :—

“ And let the said Robert Harrison, in a schedule to his answer to “ this bill, set forth a full, true, and particular account of all and singular the goods, chattels, assets, real and personal estates, effects and “ property of every nature and description, which the said Charles

"C. Yates was, at the time of his death, to the knowledge or belief of the said Robert Harrison, in anywise possessed of, interested in, or entitled to, or which have come to the hands, or possession, or within the control or knowledge of the said Robert Harrison, either since the death of the said Charles, or since the date of the said letter to the said Charles, of the 15th May, &c., specifying the nature, amounts, particulars, items, and descriptions thereof, and of each and every part thereof, whether in monies, ships, shares, buildings, lands, bills, notes, securities for money, policies of insurance, goods and merchandise, or otherwise howsoever, and specifying, item by item, of what the same consisted, and where the same were and are situated, and the quantity, quality, and value thereof, and every part thereof, and at what times in particular the same, and every part thereof, came to the hands, or within the control of the said Robert; and in what manner, and when and how, and to whose use, the same, and each and every part thereof has been paid, applied, or disposed of, and how much thereof, and in whose hands, the same, or any part thereof, and to what value, still remains undisposed of; and let him swear that he has set forth the same fully, fairly, and truly."

In compliance with this requisition, a schedule was annexed to the answer, containing a very long list or inventory of goods, the property of Yates, supposed to have been remaining on hands at the time of his death at the river Gambia, on the coast of Africa. This inventory or statement of the property comprised the most minute particulars, *ex. gr.*, swords, sword-blades, guns, lbs. of gunpowder, glass beads, looking glasses, &c., including the number and description of the various items.

Sergeant *Greene*, and Mr. *Blake*, Q. C., for the plaintiff, insisted, that the great and unnecessary minuteness of detail in this schedule was both vexatious and oppressive, and rendered the answer clearly prolix; *Norway v. Rowe* (a).

Mr. *Walsh* and Mr. *Lane*, for the defendant, contended that the mode of answering was justified by the nature of the interrogatory.

PENNEFATHER, B.—It is certainly difficult to conceive a more searching interrogatory than this.

Sergeant *Greene*.—In *Norway v. Rowe*, a similar schedule to an equally searching interrogatory was held impertinent (b).

PENNEFATHER, B.—In that case, much was set out in the answer that was not required by the nature of the case; and what was pertinent was so mixed up with what was impertinent, that it was impossible to sepa-

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(a) 1 Merriv. 347.

(b) And see the case of *Usher v. Moore*, 1 Law Rec. 2 Ser. 219, before the late Master of the Rolls.

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rate the one from the other, and it was upon that ground that the Master reported the whole impertinent, and that the Chancellor held he was right in so doing. A very great difficulty is imposed upon a defendant, as to the manner in which he is to answer an interrogatory like this. Here is a bill seeking to restrain him from enforcing his legal rights; if the answer be short, the injunction goes. How is he then to act, when called on to set forth (as he is here) the particulars of the property, "item by item?" It is certainly a subject of regret, to find a document of this description upon the files of the Court; but the plaintiff has, in a great measure himself only to blame for it, having induced it by the form of his interrogatory. Since the plaintiff has thought proper to put forward a requisition of this kind in his bill, I feel quite incompetent to decide where the defendant ought to have drawn the line in his answer, or to determine where he should have stopped. I must, therefore, say,
No rule on this part of the motion.

Tuesday, June 25th.

**PRACTICE—RULE TO DISSOLVE INJUNCTION ON
COMING IN OF ANSWER—EXPUNGING PROLIX
MATTER.**

BARRY v. HARRISON.

On the 13th of May, a report, finding the answer to a bill for an injunction to stay proceedings at law, prolix in certain passages was sent back to the Officer to be reviewed, with directions to include therein

Mr. J. J. MURPHY, on behalf of the plaintiff, moved that the conditional order of the 8th of June, to dissolve the injunction in this cause, be set aside with costs, upon the ground of irregularity, the same having been obtained before the order of the 6th of June (whereby it had been referred to the Remembrancer to expunge from the defendant's answer the matter reported prolix), was complied with.

The answer of the defendant having been referred for prolixity, the Remembrancer reported it prolix in several passages.

By order of the 13th of May, the report was sent back by the Court,

certain other passages as prolix. On the 6th of June, the amended report was confirmed, and on the same day, an order was obtained to expunge the matter reported prolix. On the 8th, the defendant issued and served a conditional order to dissolve the injunction, on the ground of having answered the bill. On the 10th, the plaintiff served a notice, cautioning him against proceeding under that order, and requiring him to vacate it, and on the 13th, issued a summons to attend before the Officer on the 17th, to have the prolix matter expunged:—under these circumstances, a motion to set aside the conditional order to dissolve the injunction, upon the ground of its having been irregularly obtained before the prolix matter was actually expunged, was refused with costs.

Semble—that where an answer has been reported prolix, it is not necessary to have the prolix matter actually expunged, before the defendant obtains an order to dissolve the injunction upon the coming in of his answer.

with directions that it should be reviewed by the Remembrancer, and that certain other passages should be reported prolix.*

In compliance with this order the report was accordingly reviewed, and the additional passages reported prolix.

By order of the 6th of June, the report was confirmed, and by another order of the same date, it was referred to the Remembrancer to expunge the several passages so reported prolix. On the 8th of June, the defendant's attorney issued and served a rule to dissolve the injunction unless cause in four days, upon the ground that the defendant had answered the bill.

On the 10th of June, he was served by the plaintiff's attorney with a notice cautioning him against proceeding under the order of the 8th, which, it was alleged, was irregular, and requiring him to vacate it; and on the 12th of June, the plaintiff's attorney issued and served a summons for all parties to attend before the Remembrancer on the 17th, to proceed under the order to expunge, and at the same time served another cautionary notice, to which no reply having been returned, he, on the 13th, served notice of the present motion.

It further appeared, that after service of this notice the plaintiff had filed exceptions to the answer.

Mr. *Murphy*, in support of the motion. The plaintiff's attorney states in his affidavit, that he was advised he could not safely proceed upon the answer until the passages reported prolix had been expunged; *Dyer v. Dyer (a)*.

Mr. *Lane* and Mr. *F. W. Walsh*, for the defendant. It is obvious that the plaintiff's object is to throw the defendant into the long vacation, as four sitting days must elapse from the service of the rule to dissolve the injunction, before it can be made absolute. But the entry of the rule to dissolve before the prolix matter has been expunged, is not irregular; *Kenny v. Barnwell (b)*. That was a motion in every respect similar to the present. It was there contended, that at the time of obtaining the order to dissolve the injunction, the answer was not perfect, the impertinent matter not having been expunged. But the Court said, that as the Master's report pointed out the impertinent matter by particularising the lines and words impertinent, it was not necessary to have it actually expunged before this order was moved for; although *pending the reference*, the defendant could not have moved it, for at that time, it could not appear what part of the answer was to remain on record. In *Raphael v. Birdwood (c)*, Lord Eldon said, the plaintiff can expunge the impertinence, but the defendant cannot.

(a) 1 Mer. 1.

(b) 2 Cox, 26.

(c) 1 Swans. 231.

* See the preceding case.

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Pending this very motion the plaintiff has filed exceptions to the answer, apprehensive lest the defendant should succeed in dissolving the injunction.

RICHARDS, B.*—If it were necessary to lay down a rule, I would be disposed to adopt the reasoning in the case cited from *Cox*; for where you have the Officer's report finding the very words that are prolix, and particularising the passages, by describing them as beginning with a certain word in a certain page, and as ending with a certain word in a certain page, it is plain that it can be easily and at once ascertained what portion of the answer is prolix, and, therefore, I can see no reason why, pending a rule to expunge the prolix matter, a defendant should not be at liberty to obtain an order to dissolve the injunction. I would be disposed to hold, generally, that it was competent for a party to act upon the answer without having the passages reported prolix actually expunged. But in this case, I am not necessitated to go the length of laying down any general rule upon the subject.

It is too much to say that the plaintiff should be permitted to derive an advantage from his own default. The report was confirmed on the 6th of June, and the plaintiff had the carriage of the order referring it to the Officer to expunge the prolix matter. Instead of issuing a summons to have the matter expunged immediately, he does not issue a summons for that purpose until the 12th, requiring the parties to attend on the 17th of June. There was, therefore, gross delay on his part, and yet he now insists that the defendant was not at liberty to enter the sidebar rule to dissolve the injunction. Whatever the general rule may be, I consider this a case special in its circumstances. And as this motion seems quite irregular, it must be refused with costs.

Solut.

Friday, June 21st.

COSTS—CAUSE—CREDITOR—PRACTICE.

Marquis of DOWNSHIRE v. TYRRELL; and PARKER v. TYRRELL.

Where a cause in which there had been a decree to account, was abandoned by the plaintiff therein, who, without any restraining order having been served upon him, came in and proved his debt in another cause - *held*, that a defendant in the abandoned cause (a creditor whose demand was piousne to that of the plaintiff), was not entitled to have the costs incurred by him in the abandoned cause paid out of the plaintiff's portion of the fund brought into Court in the other cause.

THIS was an application on the part of Alexander Boyle, the assignee of F. Parker, to draw out a sum of money, under an allocation report, which was decreed to the said Alexander Boyle in the first cause.

A cross notice was served on the part of one Rafferty, who was also a reported creditor in the first cause, that so much of the funds to which

Scmble.—The defendant should have applied for the carriage of the decree in the abandoned cause, and had his costs added to his demand.

Boyle was entitled should be retained in Court, as would be sufficient to discharge the costs of the said Rafferty, who was made a defendant in the second cause. It appeared that the second cause was instituted by Parker, to raise the amount due to him on foot of two annuities granted in the year 1819; and that in this cause Rafferty was made a defendant, as claiming under a mortgage made by the inheritor in the year 1820. A decree to account was pronounced in the second cause, but Parker, the plaintiff in that cause, abandoned the decree, and came in under the decree in the first cause, and proved his demand.

Mr. *T. B. C. Smith*, Q. C., for Rafferty.—The plaintiff in the second cause has abandoned the decree to account obtained by him therein. He had no right to do so, without taking some means to provide for the costs incurred by Mr. Rafferty, whom he has made a defendant; there was no order of the Court obliging the plaintiff in the second cause to come in and prove the demand in the first cause; and he could not have been compelled to do so, without having the costs incurred in the second cause added to his demand; the Court would, upon a proper application, have allowed him also to add the costs of the other parties whom he had made defendants. Mr. Parker has not done this; and unless the fund reported due to him be retained in Court, Rafferty will be left without any remedy for his costs.

Mr. *W. Brooke*, Q. C., and Mr. *B. C. Lloyd*, *contra*.—Mr. Rafferty's application cannot be sustained on any principle. A decree to account was pronounced in the second cause, which is as much the decree of the defendant as of the plaintiff; and if the plaintiff neglected to carry on that decree, any other party in the cause, by doing so, would, upon application, have obtained the carriage of it, and the defendant would have had his costs decreed to him; so that the defendant is as much guilty of neglect in not proceeding on the decree as the plaintiff. Moreover, even suppose he had done so, all he could have gained would be, to have his costs decreed to him in the same priority with his demand, but not out of the fund decreed to the plaintiff in the second cause, who is a prior creditor to him.

RICHARDS, B.*—The arguments used by the counsel for Mr. Boyle are quite decisive against Mr. Rafferty's application. Rafferty is a puisne creditor, and he never could have obtained his costs out of the funds decreed to a prior creditor. Besides, he has not taken the proper steps to secure his costs. It was quite open to him, when the plaintiff abandoned the decree in the second cause, to have applied for the carriage of that decree, and then his costs would have been added to his debt.

No rule on the motion of the said C. Rafferty, without prejudice to any application he may be advised to make to have his costs in the cause of *Parker v. Tyrrell* added to his demand.

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Friday, November 24th. 1839.

Monday, December 2d.

Tuesday, December 3d.

PRACTICE—PROCESS-SERVER—PROSECUTION—PERJURY—SETTING
ASIDE PROCEEDINGS—COSTS—AFFIDAVIT OF SERVICE OF PRO-
CESS—IRREGULARITY—TITHE COMPOSITION—ABATEMENT OF
SUIT—SEQUESTRATION—ATTORNEY.

JAMES EGAN and The Right Rev. LORD ARCHBISHOP OF CASHEL,
Plaintiffs;

THOMAS DOHERTY and others, Defendants.

Quest. Is a
process, upon
general
process, upon
general process,
the act of his
process-server
as to the issue
for costs of
process, to
set aside pro-
cess entered
against de-
fendants who
have succeed-
ed in resist-
ing such pro-
cess-server of
property, in
swearing to
the service of
subpoena in
the cause.

Where the
process-server
pleaded guilty
to an indict-
ment for per-
jury, *held*, upon
the special cir-
cumstances of
the case, that
the plaintiff
and his attor-
ney should pay
to the defend-
ants all costs
incurred by
them in setting
aside the process,
except the costs
of the prosecu-
tion of the pro-
cess-server, over
which the Court
considered that
it had no control.

THIS was a motion on behalf of eleven of the defendants, against the surviving plaintiff, James Egan, and his attorney, William Egan, for the costs and expenses of all proceedings taken by the applicants to set aside the process in this cause, including the costs of the prosecution of the process-server for perjury, and of the motion. There was a cross motion on the part of the plaintiff, to set aside the absolute order obtained by the said defendants, to vacate the process in this cause.

The following were the principal facts of the case, as they appeared from the several notices, affidavits, and other documents relied upon.

The bill in this cause was filed on the 3d of April, 1838, in the names of James Egan, as sequestrator of the Rev. William Parsons, who was Rector of the parish of Solliheadbeg, in the county of Tipperary; and also in the name of the Archbishop of Cashel, against the applicants and several other occupiers of lands in that parish, for the purpose of recovering the arrears of tithe composition for the years 1834, 1835, 1836, and 1837.

The affidavits of the process-server, James O'Connell, sworn in Tipperary on the 24th of April, 1838, but not filed in Dublin until the 28th of May following, deposed to service of subpoenas upon twelve of the defendants in this cause, in the town of Tipperary, on the 5th of April preceding, being only the second day after the filing of the bill. Upon these affidavits, Mr. William Egan, the attorney upon record for both the plaintiffs, and who was brother of the plaintiff James Egan, had entered process up to an attachment, and was about to issue com-

been filed to recover arrears of tithe composition, in the names of a seques-
trator, and of the Archbishop of the diocese *held*, that the defendants
with their motion for costs, although the Archbishop had died, the bill hav-
ing his sanction, he being a mere nominal party to the suit, and neither
he nor his successor being interested in the result of the motion.

They were not required to enter any appearance to entitle them to bring for-

ward an affidavit of the process-server is conclusive as to the fact of service, until
perjury has taken place; and although such affidavit should eventually
also, the process entered upon it is regular, since an irregularity must
imperfectly apparent upon the face of the proceedings.

missions of rebellion against the applicants, when, upon the 12th of June, 1838, they caused notices of two motions to be issued. By one of these notices, after stating that the applicants had never been served with any subpoena, and that they were not liable to the plaintiffs' demands in this cause, the plaintiffs' attorney was required to vacate the process entered against the applicants, and to strike their names out of the bill; and the attorney for the applicants offered, in case the process was vacated, to enter appearances and file answers for the applicants forthwith; and the notice also stated, that if not acceded to within two days, a motion would be made to vacate the process entered against the applicants. The other notice was to the effect, that a motion would be made, on behalf of the applicants, to take the affidavit of the process-server off the file, in order that he might be prosecuted for perjury at the ensuing Clonmel Assizes.


Upon the 14th of June, 1838, each of the applicants filed an affidavit, in which he stated, that he had been recently informed he was made a defendant to the bill filed in this cause; that he had never been served with any subpoena; that he believed he was not liable to the plaintiffs' demands; that he was ready to appear and answer the bill, but submitted that he ought not to pay the costs of process entered upon an affidavit of service which was false.

Upon the 16th of June, 1838, an affidavit was filed by William Usher, on behalf of the plaintiffs, in which he stated that he had been employed by the plaintiffs' attorney to procure the service of subpoenas; that the said O'Connell was strongly recommended as an honest and correct man; that he was certain the subpoenas had been duly served as stated in O'Connell's affidavit; and that the names of all the applicants appeared as tithe-payers in the applotment-book of the parish.

Upon the 19th of June, 1838, two conditional orders were made in Court by Baron Richards: the one, to take the process-server's affidavits off the file, unless cause within ten running days after service, and cause, (if any) to be shewn in Chamber; and the other, to vacate the process, unless cause within ten sitting days after service.

The conditional order to take the affidavits off the file, was shortly afterwards served upon O'Connell and the plaintiffs' attorney; and, on the 29th of June, 1838, a motion was made before Baron Richards, in Chamber, to shew cause against that order. Upon that occasion, the seal-book of the Court, in which the date of, and sum paid upon, the sealing of each subpoena is entered, was produced by the Officer, the late Mr. Jackson, at the instance of the counsel for the applicants; and, upon inspection, it appeared that one subpoena only was sealed and paid for on the 3d of April, 1838, in a cause of *Egan v. Coffey*. It did not then appear, from the seal-book, that any other subpoena had been sealed or paid for in that cause on or before the 5th of April. There

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other defendants, positively denied the charge of bribing or collusion with the process-server, and relied upon the affidavits of their attorney and of Michael Hickey to shew, that after the making of the absolute order of the 29th of June, 1838, William Egan had advised O'Connell to keep out of the way, to avoid the inconvenience of lying in prison until the ensuing Summer Assizes, and also relied upon the said affidavit of William Usher, of the 15th of June, 1838, and upon certain affidavits made by O'Connell, in a cause in the Queen's Bench, of *Parsons v. Ryan*, and which affidavits were sworn in Dublin, and signed and verified by William Egan on the 6th of June, 1838, as well as upon some admissions contained in the affidavits of William Egan and of Usher; from all which it might be inferred that William Egan, contrary to his affidavits upon the subject, had been in communication both with O'Connell and Usher subsequent to the time when the affidavits of service were sworn, and had been to some extent instrumental in preventing the trial of O'Connell at the Summer Assizes of 1838. The defendants also produced the affidavits of three persons to contradict the affidavits of William Egan, that he had not any notice of the conditional order to vacate the process before it was made absolute. It appeared from an affidavit of William Egan, that Usher had been the tithe proctor of the Rev. William Parsons; that he became his creditor, and had employed William Egan to issue a sequestration to levy the amount of his debt; and that, therefore, Usher was substantially the real plaintiff in the suit. It was also stated in an affidavit of the plaintiffs' attorney, that before the bill in this cause was filed, he had caused lists of the tithe payers, including the names of the defendants in this cause, to be posted at the police-station and post-office of the town of Tipperary, and that he had caused letters addressed to each of the defendants to be put into the Tipperary post-office, apprising them of their liabilities, but which letters they had neglected to release.

The seal-book was produced and minutely examined by the Court, on the 29th of November, 1839, when this motion was opened; it then appeared that opposite to the above entry of one subpœna, under the date of the 3d of April, 1838, the late Seal Keeper had on the 5th of July, 1838, written, "Error;—this should be three subpœnas:" but after a good deal of discussion and investigation, and although an explanatory affidavit was made by the plaintiffs' attorney on the 30th of November, 1839, after the motion had been opened, in which affidavit he stated, that he issued and sealed five subpœnas, and sent the same down to Tipperary on the 3d of April, 1838; the result was as stated in the judgment of Baron Pennefather (*a*), that the Court did not appear to consider the conduct of the plaintiffs' attorney free from

(a) *Vide infra*.

suspicion, or his explanations as to the issuing and sealing of the subpoenas satisfactory. The applicants, in addition, relied upon certain proceedings in Michaelmas Term 1838, in three cases in the Queen's Bench, of *Parsons v. John Ryan*, *Parsons v. Daniel Ryan*, and *Parsons v. Crough*, in which the proceedings against the defendants, founded upon the affidavits of O'Connell, had been set aside on the ground of non-service, and in one instance with costs personally against William Egan, the plaintiffs' attorney.

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Mr. T. B. C. Smith, Q. C., for the defendants, stated the facts in support of the motion. Unless the Court will decide this case against the plaintiff and his attorney upon the special facts, the important question is raised, whether a defendant, who has succeeded in convicting the process-server for perjury, can recover against the plaintiff all costs incurred in setting aside the process, including the costs of the prosecution? It does not appear that such a case has ever arisen either in England or in this country, but in *Smith v. Kellett (a)*, the Court of Queen's Bench made an order, that the costs of the proceedings and of the motion to set them aside should abide the event of the prosecution of the process-server, under which order the defendant in that case would have been entitled to costs, if a conviction had afterwards taken place. In *Wyatt's Pr. Reg. (b)* and *Howard's Eq. Excheq. Pr. (c)*, it is laid down, that if process of contempt is irregularly issued, or any irregular proceeding had, the party aggrieved is entitled to his costs. The process-server is employed by the plaintiff, and however innocent the plaintiff may be, he must be considered as responsible for the acts and misconduct of his agent. The defendants are also entitled to the costs incurred by them in prosecuting the process-server, such prosecution being required by the practice of this Court as a condition precedent to setting aside the process; besides, when the plaintiffs' attorney neglected to comply with the defendants' notice of the 12th of June, 1838, requiring him to vacate the process and offering to file answers forthwith, it must be considered that an issue was joined between the parties upon the fact of service or non-service, the most satisfactory mode of trying such issue being by prosecuting the process-server in a Criminal Court.

It is a general rule that the costs of an issue out of a Court of Equity will abide the event, and although this Court has no direct jurisdiction over the costs of proceedings in another Court, it has full power to order a party to a suit in this Court, to pay the costs of an issue in which he fails, and which was rendered necessary by his own conduct.

(a) *Crawf. & Dir.*, A. N. C. 452.

(b) P. 145.

(c) P. 797.

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It is submitted, however, that without deciding the abstract question, the Court would be fully warranted, by the special circumstances of this case, in making an order that the plaintiff and his attorney shall pay to the applicants all the costs they seek by their motion. The time of the issuing and sealing of the subpoenas in this cause remains unexplained, notwithstanding the special notice of the 30th of January last, and there are some other suspicious circumstances which still require explanation. The defendants are quite regular in making this motion, without having appeared in the cause, upon the principle that a party in contempt has a right to come in and shew that the proceedings placing him in contempt are altogether void and irregular. *King v. Bryant (a)*; *Davidson v. Marchioness of Hastings (b)*.

December, 2nd and 3d.

Mr. Bennett, Q. C., and Mr. R. C. Walker, *contra*.—This Court has no jurisdiction over the costs of a criminal prosecution, and with respect to the other costs, there is no reported case deciding that a plaintiff is responsible for the misconduct of the process-server, or that he is liable to costs, if the affidavit of service should prove false. The rule of all the Courts is, that the affidavit of the process-server is conclusive upon the fact of service. The process is never set aside, unless the defendant makes a positive affidavit of merits, and that he was not served, and in such case only upon payment of the plaintiff's costs; *Persse v. Johnson (c)*. The case of Mr. Maunsell of Tervoe (*d*) was one of very great hardship, and although he positively denied he was ever served with process, and his word could not be doubted, this Court held the process-server's affidavit conclusive, and would only let him in to plead upon a positive affidavit of merits and payment of the plaintiffs' costs. In the present case, the applicants swear only that they believe they are not liable; but their liability is established beyond all question by the applotment-book, in which their names are all mentioned as subject to the tithe composition claimed by the bill. Those cases, in which a party has been ordered to pay the costs occasioned by his own irregularity, do not apply to the present case, because the plaintiffs' proceedings are all perfectly regular; and it would be attended with very serious inconvenience to the administration of justice, if an innocent plaintiff were to be held responsible for the acts or false swearing of a process-server over whom he has no control. The plaintiffs'

(a) 3 Myl. & Cr. 191.

(b) 2 Keen, 508.

See also, *Mackreth v. Nicholson*, 19 Ves. 367. *Menzies v. Rodrigues*, 1 Price, 92. *Halpin v. Hamilton*, 1 Hog. 103. *Denny v. O'Connell*, 1 Sa. & Sc. 116, and *Green v. Hogan*, Ibid. 118. n.

(c) Jones Excheq. Rep. 120.

(d) Not reported.

attorney took every possible precaution to ascertain the character of the process-server, before he was employed to serve the subpoenas in this suit, and had every reason to consider the result of such inquiries satisfactory. He also caused notices to be posted, and letters* to be sent to each of the defendants, before this bill was filed, apprising them of their liabilities, and requiring payment of the amount. The applicants do not deny that they were fully aware that proceedings were about to be taken against them. The imputations attempted to be cast upon the plaintiffs' attorney are altogether unfounded. The confusion, as to the sealing of the subpoenas in this cause, is owing entirely to the mistake of the late Seal Keeper, and the other charges made against the plaintiffs' attorney have been satisfactorily contradicted by his affidavits. It would be monstrous to hold an attorney personally liable for any miscarriage which may take place in the proceedings through the misconduct of a process-server, or neglect of the Seal Keeper, who is an Officer of the Court. The plaintiff and his attorney are free from all blame, having done all in their power to insure regularity in their proceedings; and unless they can be convicted of subornation of perjury, it would be most unjust to hold them responsible for perjury committed by the process-server. But that abstract question does not arise here, because the case of the applicants is full of suspicion. The excitement of the peasantry upon the subject of tithes has been a matter of notoriety throughout the country, and especially in this Court. Hundreds have perjured themselves to get rid of what they call an odious impost; and it is highly probable that, in the present case, the process-server was prevailed upon to attorn to the opposite side, to sell himself to the defendants in this cause, and to plead guilty, for the sole purpose of enabling the applicants to succeed upon this motion. It is impossible to assign any other motive which could have actuated this process-server to persist in pleading guilty, since the heaviest sentence has been pronounced which could have been passed upon him if he had taken the chance of a trial. Besides, it does not appear at what time, or by what means this process-server was arrested before the last assizes; and no intimation of such arrest was given to the plaintiffs' attorney, although he had opposed the motion in Chamber to take the affidavits off the file, and had long since sworn that he had instructed eminent counsel to conduct the defence, and intended himself to be present at the trial. It cannot, therefore, be said, that a *bona fide* conviction of this process-server has taken place; but it must be considered that he has been induced by the applicants to persist in pleading guilty, in order to answer their purpose of heaping costs upon the plaintiff, and in the expectation that, through their intercession, he would find no difficulty

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* See *Redpath v. Williams*, 3 Bing. O. S. 442.

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in obtaining a speedy release. This motion is altogether irregular, being made in a suit which has long since abated by the death of the late Archbishop of Cashel, who was a necessary party; *Jones v. Barrett* (a). Moreover, the cause is entirely at an end by the effect of the Tithe Abolition Act (b), and of the memorial which had been presented to the Lord Lieutenant, in Privy Council, for relief under that act.

Mr. Vincent Scully, in reply.—The objects of this motion are twofold:—First, to charge the plaintiff with the costs of these proceedings, upon the ground that he is responsible for the acts of the process-server, who is his agent and special bailiff, and upon the familiar principle, that “if one of two innocent persons is to suffer by the fraud of a third, the person who employs the fraudulent agent must suffer, rather than he who did not employ him;” *Nixon v. Hamilton* (c). Secondly, to fix the plaintiffs’ attorney personally with the costs, upon the ground of his culpable misconduct, and the suspicious circumstances attached to his acts from the commencement of the proceedings. Upon public and constitutional grounds, the Court has no right to assume authority over any subject, unless he has been made amenable to its jurisdiction by the regular service of process; and if the Court, for its own convenience, lays down a technical rule, that the process-server’s affidavit is to be regarded as conclusive upon the fact of service, until a conviction of the process-server shall have taken place, it must be upon the implied contract, that the Court will fully indemnify a defendant who is thus driven to incur the expense of a prosecution, in case he should eventually succeed in establishing that no process was, in fact, ever served, and that, therefore, he was never amenable to the jurisdiction of the Court. But, in the present case, the necessity of prosecuting the process-server was imposed upon the applicants, not only by the practice of the Court, but also by the act of the plaintiff, in refusing to comply with the notice of the 12th of June, 1838, by which the applicants offered, if the costs of process were waived, to enter appearances and file their answers forthwith; and thus the plaintiff compelled the applicants to try an issue which has been found in their favor. Shortly after the service of that notice, each of the applicants made an affidavit, positively denying the fact of service, and the plaintiff’s attorney acted most unreasonably in not being content, upon such proof of non-service, to accede to the terms offered by the notice, and which have been granted in other cases upon less satisfactory evidence, as appears from the orders

(a) Bunb. 192.

See, also, *Eagle on Tithes*, 341; *Plowd. on Tithes*, 412.

(b) 1 & 2 Vict. c. 109.

(c) 1 Ir. Eq. Rep. 57.

in *Perse v. Johnston* (a), *Fallon v. Cox* (b), and *Walsh v. Hewson* (c), in which cases the proceedings were set aside, without costs, and the defendants were let in to plead, upon affidavits of merits, and that they had not been served, although no conviction of the process-server had taken place. In *Wilson v. Wilson* (d), the defendant was let in to plead, upon payment of costs, but it does not appear that he had prosecuted the process-server, or even offered to do so. The same observation applies to the case of Mr. *Maunsell*, of Terboe, referred to upon the other side. In the case of *Cosgrave v. M'Donnell*,* Sir William M'Mahon, M.R.,

(a) Jones Exch. Rep. 120.

(c) Hayes, 373.

(b) Co. & Alc. 24.

(d) Batty, 58.

* The following note is taken partly from the Rolls' Order-Book, and partly from the statement made to the Court in the principal case, by the *Solicitor-General* and Mr. *Fitzgibbon* :—

ROLLS—JULY 10th, 1835.

Cosgrave v. M'Donnell.

In this case, an injunction had been granted against the defendant M'Donnell, to restrain him from committing waste, by raising sand and gravel upon certain lands in the vicinity of Dublin. A conditional order for an attachment had been obtained against M'Donnell, for breach of the injunction, grounded upon an affidavit of personal service of the injunction order.—M'Donnell came in to shew cause against the attachment, and by his affidavit denied the service of the injunction. The motion was much discussed on the 17th, 19th, and 24th of June, 1835, but the Master of the Rolls allowed it to stand over, with liberty for M'Donnell to prosecute for perjury the person who made the affidavit of service.

M'Donnell having succeeded in obtaining a conviction, the motion was again brought forward by him on the 9th of July, 1835, and he claimed all the costs incurred in shewing cause, including the costs of the prosecution. M'Donnell's right to succeed in shewing cause, and also his right to any costs, were strongly opposed by the plaintiff's counsel, upon the grounds that the conviction was against the weight of evidence, and contrary to the charge of Chief Justice Bushe, be-

fore whom the case was tried; and likewise, because the plaintiff was a minor. It was stated by the plaintiff's counsel, and admitted on the other side, that although another learned Judge, at the conclusion of the Commission, and in the absence of the Chief Justice, had sentenced the prisoner to imprisonment for six months, yet, upon the recommendation of the Chief Justice, who felt dissatisfied with the verdict, that sentence had been mitigated to imprisonment for one week.

Sir Wm. M'MAHON, M.R., after taking time to consider, pronounced his order on the 10th of July, 1835, whereby he allowed the cause shewn by M'Donnell against the attachment, and gave him all his costs incurred in this Court by reason of the attachment proceedings, but not the costs of the prosecution, stating that, upon general principles, he felt himself concluded by the verdict of the jury; that he was bound to consider the conviction right, and that the party who employed the process-server should be responsible for his default.

Mr. *Richards*, Q.C. (now BARON RICHARDS), and Mr. *Fitzgibbon*, for the defendant.

Mr. *Holmes* and Mr. *Pigot* (now Solicitor-General), for the plaintiffs.

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A defendant shewed, as cause against an attachment for disobeying an injunction, that the affidavit of the person who swore to personal service of the injunction order was false, and having succeeded in convicting that person of perjury, contrary, however, to the charge of the Judge who tried the case: *Held*, that the defendant was entitled to all costs occasioned by the false affidavit, except the costs of the prosecution.

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after much consideration, gave the defendant the costs of all proceedings to an attachment for disobeying an injunction founded upon a false affidavit of service of the injunction order. It does not appear that the costs of the prosecution were given to the defendants; but there, the conviction was contrary to the charge of the Judge who tried the case.

The applotment-book is evidence of the amount of the liability of the lands described as occupied by certain persons, but not that those are the persons liable. In this case, the applicants were, in fact, tenants from year to year, and their affidavits of non-liability were sufficiently positive to have entitled them to be let in to appear and answer, upon payment of costs; but, after a conviction has taken place, the Court has no power to require any affidavit of merits, the fact of non-service being now conclusively established.

It is admitted, that it is of course to give the costs of proceedings which are set aside on account of any irregularity; but it would appear to be a much stronger case for making a party pay costs, where his proceedings are not merely irregular upon account of some accidental slip or technical error, but are utterly void, and fail altogether, for want of any foundation. In the judgment and order in *Fallon v. Cox* (a), no such distinction appears to have been taken. In *Macreth v. Nicholson* (b), and *Taylor v. Phillips* (c), service of process upon a Sunday was held void, and the proceedings were set aside, with costs. Similar decisions have been made at law, with respect to services effected in a wrong county (d).

In *Frowd v. Lawrence* (e), a writ of attachment, in *Scott v. Beecher* (f), a writ of injunction, and in *Swift v. Swift* (g) a writ of *ne exeat*, were set aside, with costs, for having irregularly issued, although, in each case, the plaintiff had been guilty of a mere innocent mistake. In *Black v. Creighton* (h), Sir A. Hart, C., ordered the plaintiff's solicitor to pay costs occasioned by his own mistake, without prejudice to any claim he might be able to establish against his clerk in Court. In *Dungey v. Angone and Hernal* (i), the plaintiff and his solicitor were ordered to pay all costs of a suit, as between attorney and client; and the solicitor, who had been guilty of gross fraud and misconduct, was directed to shew cause why he should not be struck-off the roll. In *Gurneston v. Bradwell* (k), where process had been served before any bill was filed, the plaintiff and the person who made out the process were each ordered to pay the defendant 10s. costs.

(a) *Coo. & Alc.* 24.

(b) 19 Ves. 367.

(c) 3 East, 155.

(d) *Lloyd v. Smith*, 1 Dowl. P. C. 372; *Ledwich v. Pragnell*, 1 B. Moore, 299.

(e) 1 Jack. & Walk. 655.

(f) 4 Price, 346.

(g) 1 Ball & B. 326.

(h) 2 Mol. 552.

(i) 2 Ves. jun. 304.

(k) *Carey*, 46.

There is nothing in the objection, that the suit is long since at an end by the operation of the 1 & 2 *Vict.* c. 109. The several notices and affidavits used to oppose this motion, prove that the plaintiff insists that the liability of the applicants still continues; and there is no affidavit or document before the Court, to shew that any memorial has been presented under that act. Neither is there any thing in the technical objection, that the suit abated by the death of the Archbishop of Cashel. This is a motion altogether independent of the suit, in which the applicants deny that they have been properly brought before the Court, and seek to fix the plaintiff and his attorney with the costs occasioned by their wrongful act. Even in a suit regularly constituted, a defendant may move that a surviving co-plaintiff shall revive the suit within a limited time, or pay the defendant his costs; *Carey v. Davis* (a), *Adamson v. Hall* (b). There must be an analogous remedy in the present case; but it would be useless to have the suit revived, since neither the representatives of the deceased Archbishop (c), nor the present Bishop of Cashel, could be made liable for their costs, which are in the nature of a personal wrong, and therefore die with the party liable. It has been recently decided in this Court in the case of *Waldron v. Garrat*, (d), that in a suit constituted like the present, the Bishop is merely a formal party. In that case an order was made upon the sequestrator to account as the Officer of the Court, and the substantial party. It is remarkable that there also the Bishop was dead. Besides, this point upon the abatement was virtually decided by the order of the 12th of January last, directing the motion to stand for an affidavit, that the suit was instituted by the surviving co-plaintiff James Egan. An affidavit to that effect has been made, and it is sworn, and not denied, that the bill in this cause was filed without any sanction whatever from the deceased Archbishop, which would of itself be a sufficient ground for fixing the plaintiffs' attorney personally with the costs (e). The applicants and their attorney have made several affidavits, stating their repeated exertions to arrest this process-server, and bring him to trial. They deny any collusion with the process-server, and distinctly repudiate the imputation made by the plaintiffs' attorney, upon mere hearsay and belief, that the process-server was bribed by the applicants to induce him to abscond and avoid his trial. With respect to the allegation now made at the bar, that the

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(a) 1 Hog. 14.

(b) 1 S. & St. 249; S. C. T. & R. 258.

(c) *Jupp v. Geering*, 5 Mad. 375; *Johnson v. Peck*, 2 Ves. sen. 465; *Kemp v. Mackrell*, Ibid, 579; *Blower v. Morrels*, 3 Atk. 772; *Morgan v. Tendamore*, 2 Ves. jun. 316; *Jenour v. Jenour*, 10 Ves. 572; *Kiernan v. Kiernan*, 1 Law Rec. N. S. 83.

(d) 1 Ir. Law Rep. 118; S. C. Jones & Carey, 69.

(e) *Wilson v. Wilson*, 1 Jac. & W. 457; *Wade v. Stanley*, Ibid, 674; *Hall v. Bennett*, 2 Sim. & St. 78; and see *Culbert on Parties*, 12, n.

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process-server has sold himself to the defendants, and that he has pleaded guilty in order to serve their purposes upon this motion, it is contrary to all the probabilities of the case, and has no foundation whatever in any of the affidavits or other documents before the Court. It is absurd to presume, without any semblance of proof, that an innocent man would betray his employers and subject himself to such severe and disgraceful consequences, for the mere purpose of enabling the applicants to succeed upon this motion. The defendants could not compel the process-server to defend the indictment, and indeed a plea of guilty is much more free from suspicion than if a trial had taken place, when a conviction could not be obtained except upon the evidence of the applicants, which circumstance would, in that case, be urged as a very strong objection to the present motion. It is, therefore, difficult to conceive any case more perfectly free from suspicion than the present, since in every case of this description, where a trial takes place, it is absolutely necessary to examine the defendant, to prove the fact of non-service. The main grounds upon which it is sought to fix the plaintiffs' attorney personally with costs, on account of his culpable conduct, are:—First, the suspicion attached to the time when the subpoenas in this cause were issued and sealed. The plaintiffs' attorney did not attempt any explanation until after this motion was opened, although he was especially required to do so, by the notice of the 30th of January last, and the explanation he now offers is far from being satisfactory, even upon the assumption, that the deceased Seal Keeper made a mistake in entering one subpoena only, in place of three. The alteration of the 5th July, 1838, was evidently made upon the suggestion of the plaintiffs' attorney, to influence a jury, in case the seal-book should be produced at the trial, but three subpoenas will not account for the five subpoenas which are stated in the last affidavit of the plaintiffs' attorney to have been sealed on the 3d of April, 1838. Secondly, the affidavits of the plaintiffs' attorney, that he had no notice of the conditional order to vacate the process before the 15th of November, when that order was made absolute, are distinctly negatived by the affidavits of three different persons. Thirdly, it appears manifest, that the affidavits of the plaintiffs' attorney, that he had no communication with O'Connell or with Usher since the affidavits of service were sworn, cannot be depended upon; and it must now be considered, that it was in consequence of the advice given by the plaintiffs' attorney, that O'Connell kept out of the way, and thus a trial was lost at the Summer Assizes of 1838. This is a most important consideration to charge the plaintiff and his attorney with the costs, and it shews that the applicants were in a condition to sustain their motion, when the notice of the 27th of November, 1838, was served, although a conviction had not then taken place.

PENNEFATHER, B.

This is a case of considerable importance, as affecting the public administration of justice, and the parties who are interested in the result of the motion. The case has stood over from time to time, partly with a view to elicit the further facts which are now brought forward, and partly to obtain the judgment of a full Court upon a general question connected with its practice. If the Court were now going to decide the abstract question, whether a plaintiff is so far responsible for the acts and misconduct of his process-server, as to be liable to costs when a conviction for perjury has taken place, we should require some further time to deliberate, and would probably consider it desirable to confer with the other Judges upon a question which so materially affects the practice of all the Courts; but we think there are some special facts connected with the present application, which render it competent for the Court to adjudicate as to the costs, without deciding upon the more general grounds which have been adverted to in the arguments. This is an application on behalf of eleven of the defendants, to compel the plaintiff and his attorney, to pay the costs of several motions made in reference to proceedings taken against them, and also to obtain the costs of a criminal prosecution against the process server who swore the affidavits of service in this cause. This is not an application to set aside the plaintiffs' proceedings for any irregularity; because an irregularity, properly so called, must always consist in some imperfection apparent upon the face of the proceedings, and the constant course in all such cases is, to set aside the subsequent proceedings with costs. In this case the proceedings of the plaintiff are not irregular, but the defendants contend that having disputed the fact of service, and the man who swore the affidavits of service having pleaded guilty to an indictment for perjury, it must now be considered that the plaintiffs' proceedings are all void, the original process having never been served. If the Court can arrive at the conclusion that no process was ever served, the proceedings against these defendants cannot be sustained, but should certainly be set aside. The difficulty is, whether the Court can look behind a regular affidavit of service, and hold that such service did not in fact take place. It has been hitherto held that the affidavit of the process-server is conclusive, that the Court cannot look behind it, or suffer it to be controverted upon affidavits, or in any other way than by a conviction of the process-server. I use the word conviction at present, without making any distinction between a case where the process-server has been tried and found guilty, and where he has suffered a plea of guilty to be recorded against him.

It would be a consideration of paramount importance, if the Court were now called upon to pronounce a definite opinion upon the abstract question. I have no recollection that the precise question has ever been brought before any Court for its decision, after a conviction of the pro-

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cess-server. No such case has been mentioned as having arisen in this country, nor has any been cited from the English reports. A great deal of argument might be urged on the one side and upon the other. In the present case, it has been contended, and the observation is entitled to great weight, that a person must be responsible for the agent whom he selects and employs. Upon the other side, it may be said, that it would be most injurious to the interests of a suitor, and place him in a situation of very great difficulty and embarrassment, if he were to suffer for the misconduct of a person over whom he has no control, and who has violated a trust he had undertaken to discharge. As I have already observed, I am not aware of any case in which the abstract question was raised, or made the subject of solemn decision. Some cases have, indeed, been mentioned, from which it may be inferred, that the Court of Queen's Bench was of opinion, that if the process-server were convicted, the costs of the proceedings and of the defendants' application should be visited upon the plaintiff; and in support of that principle, the case of *Cosgrave v. M'Donnell* was cited, which was decided in 1835 by Sir William M'Mahon, the late Master of the Rolls. In that case, an attachment had issued against the defendant for disobeying an injunction of the Court. The defendant denied that he had ever been served with the injunction, and obtained permission to prosecute the person who had made an affidavit of the service. That person was tried and convicted; and, although the verdict was not considered at all satisfactory by the Judge who tried the case, the Master of the Rolls allowed the cause shewn against the attachment, and thought himself bound to give the defendant all the costs to which he had been put, except those of the proceedings in the Criminal Court. Although that was not a case of original process, the principle was manifestly the same. That case, therefore, appears to be in favor of this application, if the Court were now to decide this case upon authority, so far as authority has hitherto gone. But I again repeat, that it is not necessary to make any decision upon the abstract question. It appears that the bill in this cause was filed on the 3d of April, 1838, and that the process-server has sworn that on the 5th of April he served subpoenas on twelve of the defendants. Upon the 24th of April, affidavits of service were made, upon which the plaintiffs' attorney entered process up to an attachment. The defendants, by their notice of the 12th of June, 1838, called upon the plaintiffs' attorney to strike their names out of the bill, and offered to appear and answer forthwith, provided they were not charged the costs of process entered upon affidavits of service which they stated were false. At that stage of the suit, the costs of the process must have been very trifling. If the defendants were served, they ought to have paid those costs; but if they were, in fact, never served, they thought it unreasonable that they should be burthened with costs incurred without their knowledge or default. The plaintiffs' attorney refused to comply with this request, and thus adopted and made his election to abide by the affidavits of the

process-server. He certainly had a right to do so, if he thought fit; but was he not thus adopting, for a second time, the act of the agent whom he had employed? By refusing their application, the plaintiffs' attorney drove these defendants to obtain the two conditional orders of the 19th of June, 1838. Upon the discussion of the motion in Chamber, to shew cause against the conditional order to take the affidavit off the file, the seal-book was produced, from which it then appeared that only one subpoena had been sealed on the 3d of April; and the attention of the plaintiffs' attorney was particularly directed to that circumstance, so much so, that it was made a part of the order, that either party should be at liberty to require the Seal Keeper to produce that book at the trial, for the purpose of having the whole transaction more fully investigated and explained. The costs of the application to take the affidavits off the file were especially reserved by that order, which appears a better course than to make them abide the event of the prosecution, as done by the order in the case of *Smith v. Kellett*(a), since it is easy to conceive cases where a defendant ought not to pay costs, although no actual conviction has taken place; and a case might also arise, where it would be unjust that a defendant should get costs, although he may have succeeded in obtaining a conviction. The affidavits of the process-server were accordingly taken off the file in pursuance of the order, and a trial was to have been had at the ensuing Summer Assizes of Clonmel. A good deal of controversy has arisen, and a great many conflicting statements have been made with respect to this part of the case. It was stated on the one side, that the process-server had kept out of the way, at these assizes, at the desire of the plaintiffs' attorney; and, on the other hand, it was alleged that no such means were used to keep him out of the way. It is distinctly charged in two affidavits of the 23d of January last, that the plaintiffs' attorney admitted that he had advised the process-server to keep out of the way. The affidavits and explanation of the plaintiffs' attorney are far from being satisfactory to my mind; not that I would go the length of saying that he desired the process-server to keep out of the way altogether in order to avoid a trial, but that he advised him not to appear until the commencement of the assizes. What was the result of such advice? It prevented the trial from being then proceeded with. This circumstance is greatly increased in importance, when we consider the allegations made by the counsel who opposed the motion, that the process-server has pleaded guilty at the instance of the defendants. The Court cannot feel satisfied with the statement of the plaintiffs' attorney, that he had no communication with the process-server, after he swore the affidavit of service in this case, when it considers the several affidavits and documents produced to contradict that statement. It was, however, charged by the plaintiffs' attorney, that the process-server had been bribed by the applicants to

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(a) *Crawf. & Dix. Ab. N. C.* 452.

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induce him to keep out of the way for the purposes of this motion. Eight of them have positively denied this charge; and, probably, the time was too short to afford the others an opportunity of making similar affidavits. But, perhaps, it is not very material for the purposes of this motion, to inquire whether the process-server kept out of the way at the instance of the one side or of the other. The fact is, that a trial did not take place at the Summer Assizes of 1838. The defendants, however, applied for their costs, but the Court did not think fit to dispose of the motion, until a trial should be had, or the Court should feel satisfied, that there was no probability that a trial could ever take place. In this interim, a most important notice was served upon the 30th of January last, reminding the plaintiffs' attorney of the state of the seal-book, and cautioning him to be fully prepared to explain the suspicion attached to the time when the subpoenas in this cause were issued and sealed. That explanation the plaintiffs' attorney had not afforded to the Court when this motion was brought forward. He then remained perfectly silent upon the subject, and it was not until after the fact had been dwelt upon by counsel, who strongly pressed its materiality in the present motion, and that the Court had expressed its concurrence in that view, that, on the 30th of November, he filed an affidavit as to these subpoenas, which is still open to the observation, that although he swears that five subpoenas were sealed on the 3d of April, 1838, he does not say they issued in the present cause. The plaintiffs' attorney says, in his affidavit of the 17th of January last, that on the 23d of March, 1838, he received a letter from Usher, directing him to send down subpoenas against the defendants in this cause. That letter is not now forthcoming, but a letter is produced, bearing the subsequent date of the 30th of March, and which refers to the service of subpoenas upon fourteen defendants in a different cause. Thus, this matter stands upon the affidavits and explanation afforded by the plaintiffs' attorney. The process-server was at length brought to trial at the last Summer Assizes of Clonmel. The defendants' attorney swears that he was in attendance, with the witnesses and evidence necessary to obtain a conviction. It must, therefore, be presumed that he was prepared to go on with the case. The process-server is arraigned—he pleads guilty—is warned of the consequence—is remanded until a subsequent period of the assizes, when he is again brought forward—perseveres in pleading guilty, and is sentenced to transportation for seven years. But it is now alleged, that all this was done collusively, and to enable the defendants to get their costs. No such suggestion has been put forward in any affidavit made to oppose the motion. In the absence of any distinct allegation to that effect, and against all the probabilities of the case, can the Court be called upon to believe that a man was so much under the influence of the defendants, as to induce him to plead guilty to a transportable offence, in order that they should get the costs of a suit? I think the Court must infer that this man was guilty, and that it cannot regard what has taken place, less

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in the nature of a conviction, than if a trial had been had, and a verdict of guilty found. The applicants now move for the costs of the two original motions, and of the present motion, and of the prosecution of the process-server. Some technical objections have been relied upon against this motion. It is said that one of the original co-plaintiffs, the Archbishop of Cashel, having died in the month of December, 1838, the cause should be revived, by making his successor a party, and that it would be irregular to make any order in an abated suit (a). There is no substantial reason why the Bishop should ever be a party to a suit of this description, although the practice may be to make him join as a co-plaintiff. Upon the appointment of a sequestrator, he acquired a vested interest in the property sequestrated, and is liable to account to this Court, although the Court may also hold the Bishop responsible in the same manner as a sheriff is responsible for the due execution of its writs. The late Archbishop of Cashel took no vested interest in the tithe composition, which was the subject matter of this suit. He was, at the utmost, a mere nominal party; he had no personal concern in the institution of this suit, which has been conducted entirely by the plaintiff and his attorney. In fact, this point was disposed of by the order made when this motion was discussed on the 12th of January last. An affidavit has since been made, stating that this bill was filed without the sanction or privity of the late Archbishop, and his successor or representatives cannot be at all interested in the result of this motion. It has also been urged, on the part of the plaintiffs, that this cause was long since at an end by the effect of 1 & 2 Vict. c. 109. Even if the plaintiff could have taken advantage of that statute (b), to prevent the defendants from bringing forward this motion, it does not appear, from any document before the Court, that he has presented a memorial to the Lord Lieutenant, or done any other act to manifest his intention to discontinue this suit. All his acts have been the other way, and the Court does not consider that any weight is due to that objection to the present application. Now, as to the costs of the prosecution, that was a proceeding in a Criminal Court, necessary, certainly, for the purposes of justice, and to attain the object of the defendants; but we do not consider that we have any control over those costs, and therefore cannot give them to the defendants. There is no decision, or even *dictum* to that extent, and they were not given in the case of *Cosgrave v. M'Donnell*. But as to the other costs, the Court is of opinion, upon the special facts of this case, that the plaintiff and his attorney have so interwoven and identified themselves with their process-server, that they have so elected to abide by his affidavits, and to adopt all his acts, *pro bono et malo*, that the plaintiff must pay the costs occasioned by the misconduct of the agent

(a) Orders for payment of money have sometimes been made in abated suits. See *Black v. Creighton*, 2 Mol. 557; *Finch v. Earl of Winchelsea*, 4 Vin. Abr. 430, pl. 11; *Beard v. Earl of Powis*, 2 Ves. sen. 399; *Roundell v. Currey*, 6 Ves. 250; *Wright v. Mitchell*, 18 Ves. 292.

(b) See the case of *Synge v. Frost*. 1 Ir. Eq. Rep. 389.

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whom he employed, whom he trusted, and for whom he thought fit to risk the very trifling costs of process. Such being the case as to the plaintiff, it remains only to decide whether his attorney should share the same fate. Perhaps it is not very material to these parties, who are brothers, which of them should pay those costs; but, taking into account the entire conduct of the plaintiffs' attorney from the commencement of this case, recollecting that his attention was from time to time directed to the different facts, especially to the seal-book of the Court, also his omission to explain those facts until this motion was brought forward, and that, even now, his explanation is not satisfactory, we consider that, although we should exculpate him from criminality in these proceedings, he has conducted them throughout in so negligent a manner, that he ought also to pay all these costs, which are, in fact, attributable to his own conduct. The only exception we are inclined to make in his favor is, with respect to the costs of the absolute order to take the affidavits of the process-server off the file, which costs we shall give against the plaintiff only.

RICHARDS, B. concurred.*

ORDER.—Let the plaintiff Egan, and his attorney, pay to the defendants the costs of the conditional order of the 19th of June, and of the absolute order of the 15th November, 1838, to set aside the proceedings, and also the costs of the conditional order of the 19th of June, 1838, to take the affidavits off the file, and of this motion. Let the plaintiff Egan pay the said defendants the costs of the absolute order of the 29th of June, 1838; and, no rule as to the costs of the prosecution of James O'Connell (a).

* The LORD CHIEF BARON was absent during this Term, in consequence of indisposition, and BARON FOSTER was presiding in the *Nisi Prius* Court at the time the judgment in this case was pronounced.

(a) It has been thought useful to give a full report of the facts and arguments in the above case, which was eventually decided upon the special circumstances, although principles of great general importance were made the subject of discussion. It is believed that this was the first case in which a defendant succeeded in convicting a process-server, and in obtaining the costs of proceeding to set aside process entered upon his false affidavit. The abstract question, with respect to a plaintiff's liability to those costs, was not decided in the principal case; but in *Cosgrave*

v. *M'Donnell* (*supra*, p. 77, n.), it appears to have been held, upon general grounds, that innocent plaintiffs were responsible for costs occasioned by the false swearing of a person employed to serve an injunction upon their behalf. The facts of the case of *M'Kiernan v. Plunket*, 3 Law Rec. O. S. 114, which was not cited in the principal case, are too imperfectly reported to be relied upon as an authority the other way. See, also, the cases of *Wilcocks v. Read*, 1 Law Rec. O. S. 114, and *Morris v. Coles*, 2 Dowl. Prac. C. 79.

CHANCERY.

Monday, November 11th, 1839.

PRACTICE—INTEREST—DECREE ON CONSENT.

ENRAGHT v. FITZGERALD.

SUIT for specific performance of a contract to purchase lands. The bill was filed by the plaintiff on 30th April, 1836, against Charles Fitzgerald the younger, the heir, and against Charles Fitzgerald the elder, the devisee and personal representative of James C. Fitzgerald, deceased, the person who had contracted to purchase the lands in question.

The defendant, Charles Fitzgerald the elder, answered the bill, and by his answer admitted assets of the said James C. Fitzgerald, deceased, sufficient to pay the purchase money agreed on, in case the Court should be of opinion that such assets were properly applicable to the payment thereof, which defendant denied.

On the 5th June, 1837, a decree was taken by *consent*, declaring the plaintiff entitled to have a specific execution of the agreement, and by the same decree it was referred to the Master to take an account of the real and personal estate of the said James C. Fitzgerald, deceased; and the defendant, so desiring, it was also referred to the Master to report whether "a good and satisfactory title could be made to the lands in question by the plaintiffs, and at what time they were enabled to convey *the same*."

The Master made his report, dated 11th July, 1839, and after fully setting forth the accounts of the real and personal estate reported on the title, in the following terms: "I find that a good and sufficient title to the fee simple and inheritance of the lands in the pleadings mentioned can be made out, and that the plaintiffs, previous to the filing of the bill in this cause, on the 28th March, 1835, were enabled to convey the same.

On this report (unexcepted to) the cause was now set down for further directions.

The plaintiffs now contended that they were entitled to interest on the purchase-money from the 28th March, 1835, the day mentioned in the report as the time when the plaintiffs were in a condition to execute a conveyance. The defendants, on the other hand, insisted that they were only liable to pay interest from the date of the report.

Mr. Warren, Q. C., Mr. W. Brooke, Q. C., and Mr. Graves, for the plaintiff.

There is nothing to take this case out of the ordinary rule. A vendor is entitled to interest on his purchase-money from the period when he is able and willing to execute a conveyance, and the defendant is entitled to the accounts from the same period: here we offer the defendant an account of the rents, and that the amount thereof shall be deducted

On decree for specific performance of a contract to purchase lands the general rule is, that the purchase money carries interest from the day when the contract ought to have been performed.

But in a suit against an executor for specific performance of a contract by his testator to purchase lands: the plaintiff, having taken a decree on consent for specific performance and a reference to take an account of real and personal assets, was held entitled to interest only from the date of the report, the executor having admitted assets by his answer, and the accounts having being unnecessarily taken.

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from the interest on the purchase-money. In *Prendergast v. Eyre* (a), the Master of the Rolls thought there was a case for relaxing the rule; but your Lordship held the rule so strict, that the purchaser was entitled to the rents from the time the contract ought to have been completed, that it ought not to have been broken through; and the rule as to interest on the purchase-money is of necessity the same (b). If the plaintiffs be not entitled to interest on the purchase-money, from the time they were in a condition to execute a conveyance, there could have been no object in that part of the decretal order, directing the Master to report "*at what time the plaintiffs were enabled to convey the lands.*"

Mr. Pennefather, Q. C., and Mr. Blackburne, Q. C., for the defendants.

The defendant Charles Fitzgerald is brought here in his representative character. The decretal order is made upon consent, and it directs an account of real and personal assets. Our liability to perform the contract of the late James C. Fitzgerald depended upon the result of these accounts. We are, therefore, only liable to interest from the date of the report.

LORD CHANCELLOR.

The only question in this case is, how much interest the defendant is to pay. He says he is liable only from the date of the report. The plaintiffs insist that they are entitled to interest from the time a good title could have been made out. I think it is to be calculated only from the 11th of July, 1839, the date of the Master's report. I do not understand, after Mr. Fitzgerald had, by his answer, admitted assets sufficient to satisfy the contract, how it happened that, after that admission, accounts of real and personal assets should have been directed. That is unexplained. It was matter of arrangement between the parties, and I must take it that the plaintiffs considered it necessary to have the accounts taken, and that Mr. Fitzgerald, though he admitted assets, was not bound to execute the contract until the inquiries had been made. The rule adverted to by the plaintiff's counsel is correct as the general rule; but I do not consider this the ordinary case. The error here has been, in taking a decree directing these accounts. It was the duty of the plaintiff, when assets were admitted by the answer, to have told the Court that he sought no account of assets. Suppose the result of the inquiry had been, that there were *not* assets to satisfy the contract, could the plaintiff have then gone back, and relied on the admission of assets in the answer? I am disposed to think that he could not. It is said the decretal order decreed the plaintiff entitled to specific performance; but if the report had been, that there were not assets of the testator to perform it, I think that decree could not have been enforced. I think I am bound, under the circumstances, to say, that the purchaser is not bound to pay interest, except from the date of the report.

Reg. Lib. fol. 26. 12th Nov. 1839.

(a) Lloyd & Goold, temp. Plunket, 180. (b) Sug. Vend. & Purch. 97, 98, Ed. 1839.

EQUITY EXCHEQUER.

*Saturday, November 9th.*PETITION UNDER 1 & 2 VICT. c. 109, s. 16—TITHE
COMPOSITION—RENT-CHARGE.

In the matter of A. ARMSTRONG and P. MATHEWS, Petitioners ;

G. PEPPER and the Rev. A. J. MONTGOMERY, Respondents :

And in the matter of the same, Petitioners ;

T. C. HAMILTON and the Rev. E. BARRY, Respondents.

PETITION under the 16 sect. of the 1 & 2 Vict. c. 109,* stating that the Petitioner Armstrong was seized in fee of certain lands, denominated Johnsland, and reputed to have been situate in the parish of Duleek, in the county of Meath, containing 36a. 1r. 30p., for a period of 13 years last past.

That he had agreed to demise 33 acres or thereabouts of the said lands, by articles of agreement, dated in the year 1831, to the Petitioner P. Mathews, for a term of 91 years.

That previous to the applotment of the parish of Duleek by the Tithe Commissioners appointed for that purpose, Petitioner Armstrong was accustomed to pay the tithe chargeable on the said lands of Johnsland, to T. C. Hamilton, Esq., the lay impropriator of the said parish of

charged with the rent-charge, and, if so, for which of said parishes rightfully charged with tithe composition.

Where lands were applotted with tithe composition for two parishes, the Court, upon a petition presented under the 1 & 2 Vict. c. 109, s. 16, referred it to the Remembrancer to inquire and report in which of the parishes the lands were situated, and whether they were doubly they had been

* 1 & 2 Vict. c. 109, s. 16—" And forasmuch as the rent-charges made payable by this act are charged upon the lands heretofore subject to the payment of compositions for tithes, it is expedient to make provisions for the more cheap and convenient determination of the liability to such compositions, be it therefore enacted, that where any person having any interest in any lands, whereon any such composition shall have been applotted, shall dispute the liability of such lands thereto, by reason of such land having been tithe-free, or not rightfully charged with or otherwise not subject to such tithe compositions or the applotment thereof, it shall be lawful for the Court of Chancery or Exchequer in Ireland, upon the petition of any such person, in a summary way to make such order, allowing or disallowing such claim of exemption, or to direct such feigned issue or reference to any Master of the Court, or the Chief or Second Remembrancer, or other proceeding as such Court shall think proper, for the purpose of ascertaining whether such lands would have been rightfully charged with tithe composition if this act had not been made, or if such composition had not been suspended ; and if it shall appear to the Court that such land would not have been rightfully charged with such composition, it shall be lawful for the said Court so to declare, and to make such order for the amendment of the certificate and applotment of such composition, and of the entry of such certificate in the registry of the diocese, as to such Court may seem fit ; and such lands shall be exonerated from rent-charge, or such rent-charges reduced accordingly : provided that in any such proceeding the certificate or applotment of any such composition shall not be evidence of the liability of such lands to such composition, or the applotment thereof."

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Duleek, and to whom alone all tithes, both rectorial and vicarial, had, previously to said applotment, been paid.

That by the applotment made some time since 1832, for the said parish of Duleek, the lands of Johnslan were applotted, and comprised within, and under the denomination of the lands of Platten, and therein stated as being in the tenancy of the said P. Mathews, and the same were therein made chargeable with both lay tithe, which was payable to the said T. C. Hamilton, and also now, for the first time, with vicarial tithe, which was payable to the Rev. E. Batty.

That said lands had been from time immemorial, as Petitioners were informed and believed, considered to have been situate within the parish of Duleek, and to have been a sub-denomination of Platten.

That it appeared, by an applotment made since 1832 by the Tithe Commiseioner for the parish of Kilsharvan, in said county of Meath, that the lands of Johnslan were also therein applotted under the denomination of Johnslan, and also mentioned in the applotment to be tenanted and occupied by Petitioner P. Mathews, and to contain 36a. 1r. 30p., and that the tithe composition chargeable thereon, and payable to G. Pepper, Esq., as the lay impropiator, and to the Rev. A. J. Montgomery, as vicar, amounted to £4. 2s. 11½d.

That Petitioners never heard of Johnslan being chargeable with tithe for the parish of Kilsharvan; that they never paid any sum on account thereof, nor was any demand ever made on account thereof, until the said applotment under which the said G. Pepper and A. J. Montgomery now demanded the amount of the said composition or rent-charge in lieu thereof.

The Petitioners then proceeded to state, that although they did not know the evidence on which Johnslan had been applotted for the composition of the parish of Duleek, yet it had been invariably considered as situated within that parish; that they had heard, however, that under the Down Survey, the lands of Johnslan formed a part of and were situate within the parish of Kilsharvan.

That Petitioners had reasonable cause to dispute the liability of said estate and property in the lands of Johnslan to be doubly charged with the tithe composition within both the said parishes of Kilsharvan and Duleek.

The petition, therefore, prayed that the Court would, under the provisions of the 16th section of the act of the 1 & 2 Vict., c. 109, being "An act to abolish compositions for tithes in Ireland, and to substitute rent-charges in lieu thereof," make an order of reference to the Chief or Second Remembrancer, or direct such other proceeding as the Court should think proper, for the purpose of ascertaining for which of the said parishes of Duleek and Kilsharvan, the said lands of Johnslan had been rightfully charged

with the tithe composition; and that for whichever of the said parishes of Duleek and Kilsharvan the said lands shall be found not to have been rightfully charged with the tithe composition, the Court would declare that the said lands had not been rightfully charged with such composition for such parish, and make such order for the amendment of the certificate and applotment of such composition, and of the entry of such certificate in the registry of the diocese, as to the Court should seem meet; and that the said lands might be exonerated therefrom, and from all rent-charges substituted in lieu thereof by the aforesaid statute of the 1 & 2 Vict., c. 109.

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Mr. William Cary Dobbs now moved the matter of the petition, which was verified by the affidavit of the Petitioner Armstrong.

Mr. Bennett, Q.C., for the Respondents Pepper and Montgomery.—The act of the 1 & 2 Vict. c. 109, s. 16, applies only to those cases in which a *total* exemption from tithes and tithe composition is claimed, and does not apply to a case of this kind (a). The 16th section, after reciting that rent-charges are made payable by that act upon the lands theretofore subject to the payment of compositions for tithes, goes on to provide for those cases wherein it is alleged that the lands are tithe-free, or not rightfully charged with “*such* tithe compositions,” and enables the Court to direct such reference or other proceeding as it shall think proper, “for the purpose of ascertaining whether such lands would have been rightfully charged with tithe composition if the act had not been made.” There is nothing here restrictive of the sense in which the words “tithe composition” are used, and they must be consequently taken to mean tithe composition *generally*.—[PENNEFATHER, B. I think the act may be fairly read as if it contained the words, “not rightfully charged with tithe composition in *that* parish.” If the words are sufficiently comprehensive to embrace a case like the present, which is the case of lands improperly charged with tithe composition in a particular parish, we ought to give them such a meaning as will effectuate justice.]—The question is, whether the act was not meant to apply merely to those cases in which a person asserts that his lands are tithe-free, and complains that they have been improperly charged with tithe composition.—[PENNEFATHER, B. If that was the meaning of the legislature, it has used a great many unnecessary words.]—From any thing that appears on the face of the petition, the Petitioners may have lands in both parishes, and may, therefore, be rightfully charged in both; but if these lands be, as alleged, situate in one of these parishes only, that fact will afford a good defence to any action or proceeding for the recovery of the composition in the wrong parish.

(a) *Vide Comior v. The Duke of Devonshire*, ante, vol. 1, p. 328.

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In my opinion, this is a case clearly falling within the provisions of the act.

RICHARDS, B.

In a case which does not come within the words or true intent of the act of parliament, the Court cannot, of course, interfere; but in a case which falls within the very terms of the act, I think we should be doing rank injustice, were we to be astute in discovering grounds for refusing a reasonable application like the present.

What is now contended for on the part of the Respondent is, that where lands which are liable to tithe composition for their own parish, are also applotted with tithe composition for another parish, there is no relief under this act. In other words, if lands situated in the county of Cork, and applotted for a parish in that county, were also, by mistake, applotted for another parish in the county of Londonderry, it is contended, that those lands must continue liable to the payment of the composition in both counties, and that there is no remedy provided for such a state of things by the present act of parliament. That is precisely the principle contended for here. The case made by the Petitioners is, that certain lands have been applotted for tithe composition in the parish of Duleek, and that the same lands have been applotted for tithe composition in the parish of Kilsarvan; and it is insisted, that such is not a case within the act of parliament, and that in such a state of facts, the lands must continue chargeable with, and the land-owners still continue liable to the payment of such tithe composition to the tithe-owners in both parishes.

It is insisted that we cannot relieve the Petitioners under the terms of this act; but let us see what those terms are:—The 16th section gives the Court jurisdiction in cases in which “any person having any interest in any lands whereon any such composition shall have been applotted, shall dispute the liability of such lands thereto, by reason of such land having been tithe-free, or not *rightfully charged* with, or *otherwise* not subject to *such* tithe compositions or the applotment thereof.” And if it shall appear to the Court that such land would not have been *rightfully charged* with *such* composition, in case the act had not been made, “it shall be lawful for the Court so to declare,” &c.; “and such lands shall be exonerated from rent-charge, or such rent-charges *reduced* accordingly.”

The word “reduced” clearly shews that it is not a case of *total* exemption alone that gives the Court jurisdiction, but that the act equally comprehends cases in which a total and absolute exemption from tithes generally is not claimed.

It therefore strikes me, that this is a case coming directly within the very terms of the act, and that the petitioner is entitled to be relieved.

FOSTER, B.

I think, for the reasons assigned by my Brother RICHARDS, that the present is a case coming within both the terms and the meaning of the act of parliament.

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COURT.—Refer it to the Chief or Second Remembrancer to inquire and report in what parish the lands denominated Johnsland, containing 36a. 1r. 30p., in the petition mentioned, are situate, whether in the parish of Duleek or the parish of Kilsharvan; and also to inquire and report whether the said lands of Johnsland are doubly charged with the rent-charge, and if so, for which of said parishes of Duleek and Kilsharvan the said lands of Johnsland have been rightfully charged with tithe composition.

Wednesday, Nov. 27th.

**PRACTICE—ATTACHMENT FOR NON-PERFORMANCE
OF DECREE FOR PAYMENT OF MONEY—POWER
OF ATTORNEY.**

GREGORY v. HAND.

MR. NORMAN, on behalf of the plaintiff, moved for a conditional order for an attachment against the defendant, Anthony Hand, for non-performance of the decree in this cause.

An affidavit was made in support of the motion, stating that the deponent served the said defendant with the final decree and injunction for the performance of it, by delivering unto him copies thereof respectively, and at the same time tendered to the said defendant a receipt for the amount found to be due by him to the plaintiff; as in the report particularly inserted and specified. The affidavit further stated, that in pursuance of the tender of such receipt, the deponent demanded from the defendant the sum therein specified, which the latter refused to pay.

RICHARDS, B.*—The decree being for payment of a sum of money, I think you should have demanded it under a power of attorney, and have stated that in your affidavit.

Mr. Norman.—If the affidavit had stated that the deponent acted under a power of attorney, it should have been made to appear that the power

To ground an attachment for non-performance of a decree for payment of money, it is not sufficient merely to produce and tender to the defendant the plaintiff's receipt for the money at the time of making the demand. The money must be demanded under a power of attorney from the plaintiff, and that fact must appear by the affidavit made in support of the attachment motion.

* *Solus.*

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of attorney was shewn to the defendant at the time the demand was made. *Fleury v. Murphy (a)*. But here, the affidavit contains no averment that the deponent acted by virtue of a power of attorney from the plaintiff; and, according to the practice of this Court, it would appear that such an authority is not necessary. *Lowry's Rules*, p. 100.

RICHARDS, B.

The practice of the Court of Chancery requires such an authority for demanding payment of a sum decreed, and I believe the practice of this Court to be similar. Indeed, the case cited seems to shew the similarity of the practice in this respect.

No rule.

Leave was given to mention the case again before the full Court, but the motion was not subsequently renewed.*

(a) *Ante*, vol. 1, p. 117.

* The plaintiff or party may, of course, *himself* demand from the defendant the money decreed to be paid, *without* a power of attorney; but when the demand is made by a third person, it must, according to the settled practice of this Court, be made by virtue of a power of attorney, which, as stated in the

case of *Fleury v. Murphy*, above cited, must be produced and shewn to the defendant at the time of making the demand; the bare production and tender of the plaintiff's receipt for the money being insufficient to ground an attachment for non-performance of the decree.

Friday, Nov. 29th.

PRACTICE—SUPPLEMENTAL AFFIDAVIT—CONDITIONAL ORDER.

SMITHWICK V. BRADSHAW.

By the practice of this Court, a supplemental affidavit cannot be used upon a motion to make absolute a conditional order.

THIS was a motion on behalf of a receiver, to make absolute a conditional order for an attachment obtained against a tenant for non-payment of rent, notwithstanding an affidavit filed by the tenant as cause.

The conditional order had been obtained upon the ordinary affidavit, by the receiver, that a year's rent was then due, and that he had personally demanded payment of the amount.

The affidavit of the tenant claimed some credits against his rents, denied any distinct demand of payment, and stated other facts as cause against an attachment.

Mr. *Vincent Scully*, for the motion, relied upon an affidavit by the receiver, displacing the credits claimed by the tenant, and negating the other facts relied upon by him as cause against the attachment.

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Mr. *Cooper*, Q. C., *contra*, objected to the use of any affidavit by the receiver, in reply to that filed as cause by the tenant.

Mr. *Scully*.—The facts put forward in the affidavit to shew cause are not to be taken as true, without our having an opportunity of answering them.

PENNEFATHER, B.

They are to be taken as true for the purposes of the present motion. According to the practice of this Court, no affidavits can be used upon a motion to make a conditional order absolute, except those which were relied upon when the conditional order was obtained. Therefore, the supplemental affidavit made by the receiver in this case cannot be allowed to be used upon the present motion.

When new facts are brought forward by the answering affidavit, as cause against a conditional order, which the party who obtains such order considers he can displace, his proper course is, to vacate the conditional order he has already obtained, and to bring forward a distinct motion for a new conditional order, supported by affidavits stating all the facts of his case. The cause shewn must, therefore, be allowed; but as the affidavit of the tenant is not quite satisfactory, it must be

Without costs.

Friday, November 29th.

KANE v. RUSSELL.

PRACTICE—ANSWER FILED BY DEFENDANT AFTER INSOLVENCY—RIGHT TO DISMISS BILL—COSTS.

Mr. NELSON for the plaintiff, moved to set aside the rule obtained by the defendant to dismiss the plaintiff's bill with costs, and that the plaintiff's bill may stand dismissed without costs.

The bill was filed in Easter Term, 1838, to foreclose a mortgage. The defendant entered an appearance, but not having answered, process to a serjeant was entered against him on the 23d June, 1838. On the

Where the defendant after his discharge as an insolvent debtor filed his answer and entered the usual rule to dismiss plaintiff's bill with costs, the Court set aside

the rule to dismiss, and retained the bill, notwithstanding the plaintiff's acceptance of the costs of process after answer filed; but refused an application on the part of the plaintiff, for liberty to dismiss his own bill without costs.

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19th of October following the defendant was discharged as an insolvent and an assignee appointed. On the 3d November, in the same year, the defendant filed his answer, and on the 6th of the same month, at the request of the plaintiff's attorney, paid him the costs of the process which had been so entered against him, and for which a receipt was given. On the 16th November, 1839, the defendant entered the usual rule to dismiss the bill with costs for want of prosecution.

An affidavit was made by the plaintiff's attorney, stating that after the discharge of the defendant as an insolvent debtor, the proceedings in the cause were abandoned, and an application made to the assignee to sell the insolvent's interest in the mortgaged premises; and that the equity of redemption was accordingly sold under the directions of the Insolvent Court. The affidavit charged, that the defendant filed his answer for the purpose of compelling the plaintiff to pay costs, as the defendant was well aware of the proceedings in the cause having been previously abandoned. An affidavit was made in reply by the defendant, stating, that the sale of the equity of redemption did not take place until the 12th October, 1839, when it was sold to the plaintiff's clerk in trust for the plaintiff, at a nominal sum. The defendant denied that he knew of the plaintiff's intention to abandon the suit, until he saw the advertisement for the sale of the equity of redemption;—and stated that his object in filing his answer was, to protect himself against any proceedings for want of an answer on the part of the plaintiff.

PENNEFATHER, B.*—The plaintiff must proceed with the cause if the defendant insists on his doing so. Having made him a party the plaintiff cannot now dismiss the bill without costs, unless it be done with his consent. The defendant, however, had no right to file his answer after his discharge as an insolvent debtor.

Mr. *M'Donnell*, Q. C., for the defendant.—Under the provisions of the 25th *Geo.3*, c. 51, which was passed for the purpose of preventing vexatious suits, the defendant is entitled, as a matter of right, to his costs, either upon the plaintiff's dismissing his own bill, or upon the defendant's dismissing it for want of prosecution. In one case, indeed, a plaintiff was permitted to dismiss his bill without costs, but that was upon the special ground that the defendant had absconded, after he had by his own act rendered the suit useless, *Knox v. Brown* (a). Supposing the Court should consider that the defendant's insolvency, pending the suit, took the case out of the statute, his irregularity in filing his answer after his discharge

* *Solus*.

(a) 1 Cox, 359; S. C. 2 Bro. C. C. 186. *Sed vide Monteth v. Taylor*, 19 Ves. 615. *Rhode v. Spear*, 4 Mad. 51; *Rutherford v. Miller*, 2 Austr. 458.

as an insolvent was waived by the plaintiff's subsequent acceptance of the costs.

PENNEFATHER, B.

The defendant has a right to insist on the plaintiff going on with the suit against him, if he pleases;—and if he impeaches the proceedings under the insolvency as fraudulent, he is at liberty to do so; but, in my opinion, this insolvent defendant has no right to dismiss the bill with costs, nor has the plaintiff a right to prejudice the case by dismissing it without costs. If the defendant will consent, I will now make an order, that the plaintiff's bill be dismissed without costs.

The defendant refusing to consent, his Lordship made the following order:—

Set aside the said rule without costs, and without costs of this motion, and let the plaintiff's bill be retained, and the parties to be at liberty to proceed as they may be advised.*

* The following is the 3d sec. of the 25 G. 3, c. 51; "And whereas, when a bill in equity is dismissed by the plaintiff, or by the defendant, for want of prosecution, the defendant, in such cases, usually obtains but twenty shillings costs, whereby great encouragement is given to litigious persons to file vexatious and groundless bills: be it further enacted, by the authority aforesaid, that in all cases where the plaintiff in equity shall dismiss his own bill, or the defendant shall dismiss the same for want of prosecution, the plaintiff in such suit shall pay to the defendant his full costs, to be taxed by the Master, or other Officer of the Court."

Saturday, November 30th.

THWAITES v. McDONOUGH.

MORTGAGE—FORECLOSURE—STATUTE OF LIMITATIONS—PAYMENT—INTEREST—CONSENT—MINOR—DEFENCE—CREDITOR—RIGHT TO ALLOCATE—PRACTICE—OFFICER—COVENANT—RENT.

By indenture of mortgage, bearing date the 9th of March, 1810, Francis M'Mahon, in consideration of the sum of £450, conveyed to Thomas

In a foreclosure suit, the defendants,

some of whom were minors) by their answer relied on the statute of limitations as disentitling the plaintiff to more than six years' interest. In the progress of the cause, an order was made upon consent, in pursuance of which a payment was made to the plaintiff on account of his demand, *Held*, that although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between adults, yet as the interests of minors were concerned, the payment ought to be considered as made without prejudice to the rights, and subject to the equities of the parties in the cause, and ought not, therefore, to be permitted to defeat the defence relied upon by the answer.

Quære.—How far the Officer is authorised to decide between the parties in a cause upon a pleading by way of discharge, filed in the office, relying on the statute of limitations?

Where an estate *pour autre vie* is granted in mortgage, and mortgagor and mortgagee jointly make a lease of a portion of the mortgaged premises, reserving rent to both the lessors and to their heirs and assigns, and the lessee covenants for the payment of the rent accordingly, on the death of the mortgagee, the mortgagor may maintain an action of covenant for non-payment of the rent which accrues due in his own lifetime, the covenant being *quoad* the mortgagor, a covenant in gross.—But *semble* that the rent which accrues due subsequently to his death, goes to the heir-at-law of the mortgagee who may sue upon the covenant, notwithstanding the mortgagor having survived the mortgagee, for the Court will mould such a covenant so as to make the rent go, on the death of the survivor of the lessors, to the party entitled to the reversion.

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Bourchier the lands of Cahermakerilla, to hold for the lives of the *cestui que vies* in the lease under which the said F. M'Mahon held the lands, subject to the usual proviso for redemption, upon repayment of the principal sum with interest.

By indenture of lease bearing date the 17th of September, 1818, the said T. Bourchier and F. M'Mahon demised a portion of the mortgaged lands for a term, still unexpired, to Hugh O'Loughlen, "yielding and "paying every year, during the said term, to the said T. Bourchier and "F. M'Mahon, their heirs and assigns," the yearly rent of £295 of the then currency, payable on the 1st of May and 1st of November in each year, &c.

After the execution of the lease, O'Loughlen, the tenant, made to Bourchier, the mortgagee, various payments on account of the rent in discharge of the sum due on foot of the mortgage, and continued to make such payments until the 15th of July, 1828, from which time O'Loughlen paid the rent reserved by the lease to M'Mahon, the mortgagor, up to, and for the first of November, 1832.

Bourchier, the mortgagee, died in June, 1832, having previously made his will, of which he appointed the plaintiff, Thwaites, and another person executors, but the latter having renounced, the plaintiff alone obtained probate.

M'Mahon, the mortgagor, died on the 30th of May, 1833, having made his will, under which the several defendants (two of whom were minors) claimed an interest in the mortgaged premises.

The mortgagor not having appointed an executor, administration with the will annexed, was obtained by the defendant M'Donough, who was also the heir-at-law of the mortgagor.

The bill in this case was filed on the 26th of November, 1836, by the plaintiff Thwaites, as the executor of the mortgagee, his heir-at-law being also a party. It prayed for an account of what was due for principal and interest on foot of the mortgage, and for a foreclosure; it also prayed a receiver.

The bill stated, that the plaintiff had applied to the said Hugh O'Loughlen for payment of the rent reserved by the lease of the 17th of September, 1818, but that he had declined to pay the same, alleging, that inasmuch as Francis M'Mahon, the co-lessor of Thomas Bourchier, had survived the said Bourchier, the heir-at-law of the former was now entitled to the rent.

On the 10th of June, 1837, some of the defendants answered the bill; and on the 16th of May, 1838, a joint and several answer was filed on the part of the minors, and those of the adult defendants who claimed under Bourchier's will, relying on the 3 & 4 W. 4, c. 27, as limiting the plaintiff's right to recover interest within a period of six years antecedent to the time of filing the bill, but admitting the principal

sum secured by the mortgage, as well as interest for the above period, to be due to the plaintiff.

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Upon the coming in of the answers, the following order was made, upon a consent entered into between the parties in the cause, and signed on "behalf of the minor defendants by their guardian:—" It is ordered," &c., "that it be, and it is hereby referred to the Chief or Second Remembrancer to take an account of the sum due to the plaintiff for principal, interest, and costs, on foot of the mortgage in the pleadings mentioned, as if a decree to an account had been pronounced for that purpose, in which account all just allowances are to be given," &c. "And that the said Chief or Second Remembrancer do report the sum which he shall find to be due upon the taking of such account; and that either party shall be at liberty to set down the cause to be heard on said report, if they shall so think fit, as if the said report had been made in obedience to a decree of this Court.

"And it is further ordered that Hugh O'Loughlen, Esq., the tenant to part of the mortgaged premises, do forthwith pay over to the plaintiff the sum now due and owing by him for rent and arrears of rent, on account of his demand; the plaintiff hereby undertaking, in case it shall turn out upon the taking of the said account, that there is not so much due to him, to refund the overplus, and pay it to the defendant Charles M'Donough, on behalf of the other defendants; and the plaintiff hereby consenting, in case the said sum, so due by the said O'Loughlen, shall not be sufficient to satisfy the sum which shall, upon taking such account, as aforesaid, be found to be due to the plaintiff, to accept the balance, by payment of a moiety of the profit rent of the mortgaged premises."

"And it is further ordered, that in case the said Hugh O'Loughlen shall not pay the amount now due by him to the plaintiff, within one month from the date of said consent, that a receiver be, at the expiration of that period, appointed to receive the rents and profits of said mortgaged premises, and that the said receiver be at liberty to pay the plaintiff the sum now due by the said Hugh O'Loughlen, for rent of the said premises, as soon as such receiver shall receive the same, and that he shall have credit for the said sum in passing his account."

In pursuance of this order, the Remembrancer made his report, bearing date the 25th of June, 1839, in which, amongst other matters, he found as follows:—"I find that after the death of the said Francis M'Mahon, the said Hugh O'Loughlen did not pay the rent reserved by the said indenture of lease, and that at the time of the making of the said order of reference, he owed an arrear of £675 on account of said rent," &c.

"I find that since the pronouncing of the said order, namely, on the

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"7th day of June, 1838, the said Hugh O'Loughlen, pursuant to the said order, paid to the plaintiff *on account of his demand*, the sum of £675, of the late currency, being on account of said arrear due by him, as aforesaid, at the time of pronouncing said order. And,

"I find that crediting the plaintiff with the said principal sum of £450, late currency, so secured by said mortgage, and with interest thereon for a period of six years next before the filing of his bill, being the sum of £162, late currency, and with the sum of £41. 5s. for subsequent interest to the 7th of June, 1838 (which interest only I am of opinion, and find that said plaintiff is under the provisions of the statute (3 & 4 W. 4, c. 27) entitled to have reported as a charge upon the said mortgaged premises), and debiting him as against same with the sum of £675, so paid by the said Hugh O'Loughlen, I find that said plaintiff has been over-paid all principal, interest, and costs, on foot of said mortgage, by a sum of £21. 15s. late currency.

"I find, however, that it was contended before me, on the part of the said plaintiff, that he had a right to allocate said payment of the said Hugh O'Loughlen, to the discharge, in the first place, of the interest, which accrued upon said principal sum anterior to the said period of six years next before the filing of his said bill (and which interest I do not find was paid, no evidence thereof having been laid before me), and afterwards in liquidation of the subsequent interest and the principal, so far as same would extend; and for the purpose of saving expense to the parties, I have taken the account in the manner contended for by the plaintiff, and find that in case your Lordships shall be of opinion that he is entitled to interest on said mortgage, anterior to said period of six years, before the filing of his bill, and so to allocate said sum of £675, paid by said Hugh O'Loughlen, that there is due to said plaintiff for principal, interest, and costs, the sum of £217. 10s. 3d. late currency."

Mr. Cooper, Q. C., for the plaintiff.—It is not necessary to contend that the plaintiff is entitled to more than six years' interest; neither does any question of allocation of payment arise. For, in order to enable the debtor to allocate the money paid to the creditor, it must be the proper money of the debtor. The payment must be a voluntary payment,—one which he has the option of making or withholding, and not a compulsory payment. He must be entitled to say—"you must apply this money to such a demand, or I will not pay it to you." Suppose A owes B several judgment debts and B issues a *fi. fa.* or a *ca. sa.* upon one of those judgments, and the debtor pays under the compulsion of process, he cannot say to the creditor "you must apply this money to such a judgment, and not to that upon which the execution issued." Still less can he say, that money which does not belong to him, which

he cannot enforce, but which comes to the creditor's hands, must be applied to a particular demand. Now, to whom did the money due by O'Loughlen belong? To the parties, certainly, who are entitled to the reversion of O'Loughlen's lease. M'Mahon had no estate in the land demised, at the time of the making of the lease,—he was a mere stranger. The covenant by O'Loughlen to pay him the rent, was a covenant in gross, which could, no doubt, be sued on by M'Mahon during his life, if Bouchier did not intervene, but could not be sued on by M'Mahon's heir or devisee,—because M'Mahon had no estate with which that covenant could run.

The rent, upon the decease of the mortgagor, ran with the reversion to the heir or devisee of the mortgagee, *Webb v. Russell* (a). The assignee of a lease by estoppel shall not take advantage of any covenant; *Noke v. Awdler* (b).

Then does the consent make any difference? The consent is, that O'Loughlen shall pay the money to the plaintiff *on account of his demand*—not on account of the sum admitted to be due by the answer. Why was the consent entered into? To remove O'Loughlen's objection to pay. The money never got into the hands of the representatives of the mortgagor: and even if it had, they could not have allocated it, it not being their money. The plaintiff might have recovered the money from the representatives of the mortgagor if they had received it from the tenant, by an action for money had and received to his use. Supposing, for the sake of argument, that the heir-at law of the mortgagor had received this money, that it belonged to him, and that he paid it to the plaintiff on account of his *demand generally*, as in the consent, without allocating it to the interest due within six years, the plaintiff might allocate it to that interest at any time. The law now is, that the debtor must allocate, at the time of payment, or he loses his right to do so; *Mills v. Foukes* (c).

Mr. Henn, Q. C., and Mr. James O'Brien, for the defendants.—Considering the case as if there had been no consent, the 3 & 4 W. 4, c. 27, would bar the plaintiff from recovering more than six years' interest.—[RICHARDS, B. I am inclined to go with you if the consent were out of the way.]—The only question then remaining is, whether the defendants are to be prejudiced by the consent? It is a material circumstance in the case, that two of the defendants are minors; besides, it is to be recollected that the point as to the statute of

(a) 3 T. R. 393.

(b) Cro. El. 437.

For the doctrine as to collateral covenants and covenants in gross, see Piatt on Covenants, pp. 67, 68.

(c) 5 Bing. N. C. 455; *Philpott v. Jones*, 2 Ad. & El. 41.

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limitations, was made by the answer, although that in the case of minors would not have been necessary.—[RICHARDS, B. This was certainly a very improvident consent on the part of the minors. I was not before aware that any of the principal defendants had been minors.]—If the consent had a tendency to prejudice the rights of the minors, the plaintiff was guilty of an impropriety in permitting it to be made a rule of Court. It is clear that its principal object was to save the expense of bringing the cause to a hearing; the account ought, therefore, to be taken under it, as if a decree to account had been regularly pronounced upon a hearing of the cause. It was never intended that a payment made under that consent should prejudice or affect the rights of the parties.

The defendants had a right to raise this question upon the statute of limitations in the office, the point having been made by the answer; *Burne v. Robinson* (a).

If this view of the case be correct, it is unnecessary to discuss the questions arising upon the plaintiff's right to allocate this money, as it must be considered as money brought into Court by the receiver. But upon this point, if it were necessary to argue it, the case of *Webb v. Russell* (b), as well as that of *Stokes v. Russell* (c), are authorities rather in favor of the defendants than otherwise.

Mr. *Sergeant Greene*, for the plaintiff, in reply.—The plaintiff had a clear right to appropriate this payment as one made on foot of the mortgage generally, so as to prevent the statute of limitations operating as a bar, unless the effect of the proceedings in the cause has been such as to derogate from that right.

The Remembrancer's office is not the proper place to raise questions of this kind—the rule was so laid down by your Lordship in the case of *Walsh v. Walsh* (d).—[RICHARDS, B. I always understood that the duty of the Officer was merely *ad computandum*, and that it was not his province to adjust nice equities between the parties in the cause; how far he may be authorised to decide between parties in a cause upon a pleading by way of discharge, filed in his office, relying on the statute of limitations, is a thing which I would not take upon myself to decide, if it be necessary to do it in this case, without a great deal of consideration; where creditors come into the office and file charges, the Officer must, from the necessity of the case, be called on to receive such a pleading and often to decide upon it.

It may be observed, however, that in *Walsh v. Walsh*, the question upon the statute of limitations was not raised by the answer or relied on at the hearing, when the decree to account was pronounced in that

(a) 1 Dru. & Walsh, 688.

(c) Id. 678.

(b) 3 T. R. 393.

(d) Jones & Carey, 52.

cause, and the plaintiff in that case elected to take a decree for dower in preference to jointure, which possibly she might not have done, had defendant at the hearing insisted on the statute of limitations. The plaintiff would, therefore, have been taken by surprise if the defendant had been allowed to rely, for the first time, in the office, on the statute of limitations. But that is not the case here, that defence having been made by the answer]—With respect to the nature of the defence in this case, it may be important to remark that the 42d section of the act which prevents more than six years' interest being recovered, bars the *remedy* only, and not the *right*. A party who relies on that statute, makes a tacit admission that more is due than he is willing to pay,—he relies on the statute as releasing him from the moral obligation he is under, to pay what he justly owes.

Bourchier, the mortgagee, was the landlord. *Webb v. Russell* shews that the lease must be considered as the lease of the mortgagee, and not the lease of the mortgagor.

The plaintiff representing the legal estate, the question may be considered as if the mortgagee were still living. The case would then stand thus:—his tenant pays him a sum of money, which, unquestionably, he has a right to allocate as he pleases; he may be considered, to a certain extent, as a mortgagee in possession, with this money actually in his pocket. Under these circumstances, the representatives of the mortgagor insist upon the money being paid back, and on the mortgagee being compelled to allocate it in a manner different from that in which he has done. This payment cannot be considered as if made by the hands of a receiver; it appears upon the face of the consent, that it was purely a voluntary payment, and that the clause relating to the appointment of a receiver was introduced merely to provide for the event of the tenant persevering in his refusal to pay the rent.

Under all the circumstances of this case, the plaintiff ought not to be compelled to pay back this money for the purpose of enabling the defendants to avail themselves of the statute of limitations to defeat a just demand.

Tuesday, December 3d.

RICHARDS, B.*

The bill in this case was filed on the 26th of November, 1836, and it prays for the foreclosure of a mortgage executed by Francis M'Mahon to Thomas Bourchier. The estate was one *pour autre vie*, and the whole interest was granted in mortgage. From 1810 to 1818, the mortgagor was allowed to continue in possession, but in the year last mentioned, a lease was made by the mortgagor and mortgagee jointly of a portion of the mortgaged premises, at a rent of £295 a-year, which was reserved

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to both the lessors, and to their heirs and assigns. The interest was kept down by the payment of the rent to the mortgagee until 1828, but from that period until 1832, it is stated that the rent was paid to the mortgagor. In June 1832, the mortgagee died, without having made any will capable of passing his interest in the mortgaged premises, but his heir-at-law has been brought before the Court as the party entitled to the reversion. On the 30th of May, 1833, the mortgagor dies. The rent which accrued during the joint lives of the mortgagor and mortgagee was payable to both, and I apprehend they might have joined in an action for it; and after the death of the mortgagee, the covenant for the payment of the rent, which *quoad* the mortgagor must be considered as a covenant in gross, might have been sued on by the mortgagor, *Webb v. Russell, Stokes v. Russell*; and during the life of the mortgagor he was entitled to enforce the payment of the rent which became due in November 1832, which, in point of fact, was paid to him, as also that which became due on the 1st of May, 1833, which was not paid to him, but remained due and in arrear at the time of his death. The rent that accrued after the 1st of May, 1833, would go, I apprehend, to the heir-at-law of the mortgagee, notwithstanding the manner in which the same appears to have been reserved by the lease, and notwithstanding that the mortgagor survived the mortgagee, for the Court would mould such a covenant as we find in this lease, so as to make the rent go on the death of the survivor of the lessors to the party entitled to the reversion in the lands. The covenant contemplates, that the rent is to continue to be paid after the death of both mortgagee and mortgagor, and the reservations to the heirs and assigns of the lessors generally, is, in my opinion, sufficient to entitle the heir of the mortgagee, who is the assignee of the reversion, notwithstanding that the mortgagee died before the mortgagor, to sue on such a covenant; but the party claiming in right of the mortgagee does not think fit to proceed at law against the tenant, or to avail himself of whatever remedy he might have had to recover at law the rent reserved upon the lease of 1818; he prefers coming into this Court, and in so doing he states a case in his bill in respect to his legal rights, or to the legal rights of the heir of Bourchier, quite opposed to that contended for by his counsel at the bar: that is, the plaintiff, the executor of Bourchier, alleges that a considerable arrear of rent was due under this lease of 1818, that there was a difficulty in enforcing payment of that rent, and that the heir-at-law of Francis M'Mahon, the mortgagor, was the person entitled to such rent, and that the plaintiff could have no relief except in a Court of Equity. It is very important, in my opinion, in considering the effect to be given to the payment made in pursuance of the consent, which I shall presently state, to notice particularly the structure of the plaintiff's bill, and the case which the plaintiff him-

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self makes upon the record, especially in respect to the inability of all parties deriving under the mortgage to recover at law the rent payable under the lease of 1818.—[His Lordship here read some passages from the bill, shewing the equity on which the plaintiff relied.]—To this bill an answer is put in relying on the statute of limitations. It cannot be denied that as between the mortgagor and mortgagee, and their respective representatives, that was a perfectly good bar against all beyond six years' interest,—and regard being had to the case as stated upon the bill and answer, the 42d section of the 3 & 4 W. 4. c. 27, was a complete defence to any claim of interest beyond that period. That being the case then, as it stood upon the pleadings, with this additional circumstance, that two of the defendants were minors, a consent is entered into on the 23d of May, 1838, to the following effect.—[Here his Lordship read the consent]. That was certainly a most improvident consent on the part of the defendants, as it neglected to preserve to them the benefit of the statute of limitations, upon which they had relied by their answer. I have no hesitation in saying, that if this transaction had taken place between adults, the terms of this consent, and the payment of the money in pursuance of it, unless controlled (which possibly it might have been) by the structure of the plaintiff's bill, and certain allegations therein, would have had the effect of defeating the bar of the statute. For, I am of opinion, that the plaintiff would in that case (if not prevented by the allegations contained in his pleading) have had a right to apply the money so received by him on a general account from his tenant, or rather from the tenant of his trustee (the heir of Bourchier) in discharge of the arrears of interest due upon the mortgage, without reference to the statute of limitations: and I am further of opinion, that the defendants would have had no equity, after it had been so applied, to come in and ask the Court to compel the plaintiff to allocate it to the payment of interest accrued due within six years. But it is unnecessary to consider what the construction of the consent ought to be if entered into between adults, for I must give it that construction which, in my opinion, the Court would and ought to have given it, had their attention been called to the circumstance, that the interests of minors were concerned, when making the same a rule of Court. Had the Court been about to make an order pending the cause, for the payment of money to the plaintiff on foot of his demand, I do not think the Court would have done so without guarding its order in such a way as would prevent the plaintiff from defeating the defence relied on by the minor defendants in the cause, by means of any payment to be made thereunder, which is just what is now sought to be done by the plaintiff in this case. The Court, I conceive, would have taken care that such order should not operate to waive or destroy any defence which the minor defendants had relied

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on by their answer, or were entitled to rely on at the hearing of the cause, in bar of any part of the plaintiff's demand, whether such defence should be founded upon the statute of limitations or otherwise.

Under these circumstances, and looking carefully into this consent, I am of opinion, that I must consider the payment made under and in pursuance of it, in like manner as if so much money had been paid by a receiver appointed by the Court, or, at all events, as a payment obtained through the aid of proceedings in this cause, constructed as it is, and consequently as a payment made without prejudice to the rights, and subject to the equities of the parties in the cause, and without any power to the plaintiff to make use of such payment to the prejudice of the defendants, or of the defence relied on by them; and this consent having been entered into after a defence in the nature of a plea of the statute of limitations had been set up by the answer, and without reserving that point either for the Officer or for the Court, and without saving the rights of the minors in more express terms than has been done,—I must declare that the consent-order was improvidently made and must rule the special point in favor of the defendants.

I feel a good deal embarrassed by the question of costs, but I am inclined to think upon the whole, that I should say no costs at either side. There was certainly a large sum of money due to the plaintiff when he filed his bill; but again, if I am right in the general view which I take of the case, all the litigation in the cause subsequent to the date of the consent, must appear to have been altogether unnecessary and unfounded. I, therefore, say no costs at either side.

Wednesday, Nov. 27th.

**PRACTICE—SERVICE OF ORDER—RECEIVER UNDER
1 & 2 Vict. c. 109, s. 30—RENT CHARGE.**

MANGAN v. MASSY.

The mode of service prescribed by the 30th section of the Rent-charge Act (1 & 2 Vict. c. 109), with respect to the ten days' notice of a party's intention to apply for a receiver under that act, is not applicable to the service of the order appointing such receiver, which must be served in the usual manner required by the practice of the Court for the service of its orders.

MR. ORPEN moved to make absolute the conditional order for a receiver, which had been obtained in this matter, under the 30th section of the 1 & 2 Vict. c. 109, on the 21st of July last, and stated that the respondent was abroad, and that the conditional order had been served in the same manner as the ten days' notice required by that section, namely, on the land-agent of the respondent, but that the Officer had refused, on such service, to give a certificate of no cause.

Counsel relied on the 30th section, as providing no particular means for the service of the conditional order, and contended that, by analogy, it might be served in the same way as the ten days' notice.

RICHARDS, B.*

Although that section authorises the service of the notice upon the agent of the respondent, it does not repeal the practice of this Court with respect to the service of its own orders. That practice requires a service of the order on the party himself; or, in a proper case, the Court will authorise a substitution of service. In this case, it ought to have been made a part of the original application to substitute the service of the conditional order upon the land-agent of the respondent. As it is, I must refuse the motion; but I will now give you an order for the substitution of service.

Order to substitute service accordingly.

* *Solus.*

Monday, Dec. 2d.

PRACTICE—SETTING DOWN CAUSE FOR HEARING— OBJECTIONS—REPORT.

WARREN v. POWER.

MR. DIXON, Q. C., on the calling on of this case as a short cause, upon report and merits, objected to its having been irregularly set down, the order for hearing having been taken out before the conditional order to confirm the report had been made absolute, although objections to the draft report had been taken in the Remembrancer's office, on which exceptions to the report itself might have been grounded.

Mr. Sergeant Curry, for the plaintiff.—The usual course is, to enter the rule *nisi* to confirm the report, and, at the same time, to enter a rule to set down the cause on report and merits.

RICHARDS, B., having referred to Mr. Tench, the Register, said, such is the course only where no objections have been taken to the draft report, and where, consequently, no exceptions can be taken to the report itself.

Mr. T. K. Lowry (*amicus curiæ*), said, as it was a question of consi-

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Where objections have been taken in the office to the draft of the Remembrancer's report, it is irregular to set down the cause to be heard on report and merits until the report is confirmed, unless the objections to the draft report have been allowed, and the report, as signed, varied accordingly.

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derable practical importance, he thought it right to state, that although the practice, as laid down by the Register, might be the proper practice, yet that he had taken the opportunity, some time ago, of personally making inquiry at the Assistant Register's office, as to the actual practice there adopted in setting down causes on reports, and he was informed that no certificate from the Remembrancer was required when setting down a cause, as to whether or not objections had been taken to the draft report in the office, and that a party might, immediately on entering the conditional rule to confirm the report, set down the cause to be heard on report and merits: but that, if before the expiration of the rule to confirm the report, exceptions are filed, the order for hearing on report and merits falls to the ground, and the cause must be again set down on report, exceptions, and merits. And in support of this practice, he mentioned the case of *M'Kittrick v. M'Kittrick*,* heard as a short cause on Saturday last, in which it had been actually adopted.

PENNEFATHER, B.—We think the practice, as stated by the Register the more convenient and regular one. A great deal of expense would be incurred by setting the cause down a second time, if exceptions are taken, after a cause is set down on report and merits.

Sergeant Curry. I find, however, that in this case, the objections taken to the draft report by the defendant, who now raises the objection, were allowed by the Remembrancer, and the report varied accordingly.

PENNEFATHER, B.

In that case, then, there could be no exception taken to the report, and the cause has been, therefore, set down regularly.

* *The following are copies of the orders in this cause:—*

M'Kittrick } The 10th day of
and others } June, 1839.

v. } Upon motion of
M'Kittrick } Mr. W., Attorney
and others. } for the plaintiffs, It

_____ } is ordered by the
Court, that the defendants do, in
four sitting days after service of
this order, shew cause, if any they
can, wherefore the report made in
this cause should not be confirmed.

Same } The 11th day of
v. } June, 1839.

Same. } Upon motion of Mr.
_____ } W., Attorney for the
plaintiffs, It is ordered by the Court,
that this cause be set down to be
heard, upon report and merits, the
sixth of the eight days after the
present Term.

[Exceptions to the Report having

been filed on the day of June
last, the order for hearing on report
and merits thereby fell to the
ground, and the cause was again
set down in the present Term, pur-
suant to the following order:—

Same } The 18th day of
v. } Nov. 1839.

Same. } Upon motion of Mr.
_____ } W., Attorney for the
plaintiffs, It is ordered by the
Court, that this cause be set down
to be heard, upon report, excep-
tions, and merits, the fifth of the
eight days after this Term.

This case of itself affords an il-
lustration of the inconvenience
which would result from the
the practice above condemned by
the Court.

Friday, Dec. 6th.

**ECCLESIASTICAL COURT—SUIT TO RECALL PROBATE—
ADMINISTRATOR PENDENTE LITE—EQUITY
JURISDICTION.**

THOMAS v. THOMAS.


THIS was a motion for a receiver over the personal estate of Benjamin Thomas, deceased, and an injunction against the defendant collecting or receiving the assets of the deceased. The bill was filed on the 2d of this month, and notice of this motion was served the same day together with the subpoena.

The bill was filed by the plaintiff, claiming as heir-at-law of the deceased, alleging the will to have been obtained by undue means, and stating that probate thereof had been taken out in common form by the defendant during the minority of the plaintiff; that the plaintiff had instituted a suit in the Ecclesiastical Court, for the purpose of recalling that probate, and that the assets of the deceased were in danger of misapplication by the defendant in the mean time. The bill, therefore, prayed the appointment of a receiver of the personal estate pending the litigation in the Ecclesiastical Court to recall probate, and also prayed for leave to bring an ejectment, under the orders of the Court, for the recovery of the real estate in the town of Wexford, which had been mortgaged by the deceased, and which, consequently, could not be recovered by ejectment, unless the defendant were enjoined to waive legal bars.

Pending a suit in the Ecclesiastical Court to recall probate, a Court of Equity will entertain a bill for the preservation of the assets, and the power of the Ecclesiastical Court to appoint an administrator *pendente lite*, is no objection to such a bill.

Mr. Litton, Q.C., with whom was Mr. Haig, now moved, on notice, for an injunction and receiver as to the personal estate of Benjamin Thomas, deceased, until the litigation now pending in the Ecclesiastical Court should be determined, or until answer or further order; and, as to the real estate, the plaintiff, by his present motion, also sought for leave to bring an ejectment under the orders of the Court, and, if leave should be given, an injunction to restrain the defendants from setting up the outstanding mortgage or other legal bars to defeat that ejectment.

The verifying affidavit stated that the late Benjamin Thomas, being possessed of considerable personal estate and certain freehold property in Wexford, on the 14th April, 1836, was attacked by brain fever, of which he died after two days' illness. That on the day he died, while in a state of mind which rendered him incapable of making a valid devise or bequest, a paper, purporting to leave all his property, real and personal, to his wife, in exclusion of his children, was placed before him, and a signature attached, by guiding the hand of the dying man. That after his death, his widow, the present defendant, had proved the

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instrument as a will in the Ecclesiastical Court in common form. That the present plaintiff was the eldest son of the deceased, and having now come of age, had taken proceedings in the Ecclesiastical Court to recall that probate. That litigation was still depending. The plaintiff swore, in his affidavit, that he believed the assets of his late father were in danger of being lost through the waste and misapplication of the defendant, who had become embarrassed in her circumstances, and in danger of an actual arrest. These facts, it was submitted, made the case stronger than *King v. King (a)*, where it was held that the pending litigation in the Ecclesiastical Court was sufficient to induce this Court to appoint a receiver of the personal estate.

Mr. Collins, Q. C., contra.—The plaintiff comes here three years after the death of the testator to impeach the will. The litigation in the Ecclesiastical Court is not a ground for this Court to interfere by appointing a receiver of the personal estate. If there be a proper case for it, the Ecclesiastical Court, where that litigation is pending, will appoint an administrator *pendente lite*.

PENNEFATHER, B.

The power of the Ecclesiastical Court to appoint an administrator *pendente lite* has never been allowed to oust the jurisdiction of this Court to appoint a receiver. The plaintiff here certainly comes very late, after three years to make these charges. It is highly inconvenient to call for an investigation, after so long a period has elapsed. However, I think there is such a case made as to induce the Court to grant a conditional order for a receiver, unless cause shewn in the beginning of next Term, and to issue an injunction to restrain the defendant from collecting or receiving any of the assets in the mean time.

The order having been pronounced accordingly,

It was then proposed, on the part of the defendant, that as the question with respect to the validity of the will might be equally well tried in the ejectment, in order to avoid expense, the suit in the Ecclesiastical Court should be stayed; which proposal was accepted on behalf of the plaintiff, on condition that the defendant should consent to the second part of the application, viz., for leave to bring an ejectment forthwith, in order to try the question.

The COURT accordingly (the defendant consenting thereto), granted the second part of the application also.

Saturday, December 7th.

EXTENDING RECEIVER UNDER 5 & 6 W. 4, c. 56—TRUST TERM—JUDGMENT—COLLATERAL SECURITY.

WHITE and Wife, Petitioners, *v.* BLAKE, Respondent.BRENNAN and others, Petitioners, *v.* same Respondent.CONCANON, Petitioner, *v.* same Respondent.

MR. CONCANON moved, in these matters, that the conditional order of the 7th November last, that the receiver appointed in the first matter, and extended to the second matter, should be extended to the third, might be made absolute, notwithstanding cause shewn.

The petition of Edmund J. Concanon stated, that Anthony Blake obtained a judgment in Trinity Term, 1811, for the sum of £1600 Irish, besides costs; that he died intestate in June, 1826, and that administration was granted in the same year to his widow, who assigned the judgment to petitioner. That J. C. Blake, the consuzor of the judgment, was seized in fee of the lands in the petition mentioned; that petitioner revived the judgment, in his own name, in Easter Term, 1839; that the receiver had been appointed in the first matter in 1838, and extended to the second on the 30th May, 1839.

An affidavit to shew cause was filed by George Blake, the heir-at-law of J. C. Blake, stating, that the judgment was a collateral security with a charge created under a family settlement in 1808; and that petitioner had proceeded in Chancery, and filed a charge in the Master's office on foot of this judgment.

Mr. Concanon contended, that even if the charge and judgment were collateral securities, it was merely a matter of account, and no cause why the receiver should not be extended. He referred to the case of *Rosengrave v. Lopdell* (a), to shew that a receiver will be granted under this act upon a judgment, although a suit was pending in the Court of Chancery, founded on the same judgment.

Mr. Jennings, *contra*.—This judgment is a collateral security with the charge created under the deed of 1808, vesting the legal estate in trustees, and the Court cannot extend a receiver over a trust term. Besides, the petitioner having filed a charge in the Chancery cause, cannot now proceed by petition under this act.

Mr. Fitzgibbon, in support of the petition, stated that the trustees

The Court will extend a receiver on a judgment under the 5 & 6 W. 4, over a trust term, unless it appear that the trustees are in possession.

In such a case, it is no cause against extending the receiver that the judgment is a collateral security, and that petitioner has filed a charge in a Chancery suit on foot of the same demand.

(a) 4 Law Rec. 2 Ser. 223.

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had never gone into possession, which J. C. Blake, the conuzor, had always been permitted to retain.

PENNEFATHER, B.

The circumstance of the judgment being a collateral security is no cause against the extension of the receiver; the very reason for taking a collateral security is, that if one mode of proceeding prove ineffectual, another may be adopted. The other ground of objection is equally untenable. Therefore, let the conditional order be

Made absolute.

Same day.

PRACTICE—COSTS—HEIR-AT-LAW—JUDGMENT.

Executors of DOWNES v. HOGAN.

Where a bill was filed to recover the amount of a judgment debt out of the real and personal estate of the conuzor, *Held*, that the defendant, who was a minor, and the heiress-at-law of the conuzor, was not entitled, as against the plaintiff, to the costs of putting in an answer.

In this case the defendant, was a minor, and the heiress-at law of the conuzor of the judgment, for recovery whereof, out of the real and personal estate of the conuzor, the bill was filed. The defendant, who had put in a short answer, not longer than would have been filed for her by the Officer, now claimed her costs against the plaintiffs.

Mr. *W. H. Griffith*, for the plaintiffs.

Mr. *Hobart*, for the defendant submitted that it was the usual course for a defendant, a minor, to get costs against the plaintiff in such a case as this; that the estate had been cast upon her, and that she did not file an answer longer than would have been put in for her by the Officer, who would, undoubtedly, get his costs against the plaintiffs; that the fund would prove deficient; and that it was the practice of the Courts of Equity in England to give to a defendant circumstanced as this defendant was, costs against the plaintiffs; but

The COURT said, they never gave costs in such a case as this, and refused the application.*

* An heir is entitled to his costs, for it is the law which casts the descent upon him; but it is otherwise with respect to an executor, because he may renounce. *Humphrey v. Morse*, 2 Atk. 408; *Biddulph v. Biddulph*, 2 P. W. 285; *Uvedale v. Uvedale*, 3 Atk. 119.

ROLLS.

*Friday, November 22d.***EQUITABLE LIMITATIONS—RULE IN *SHELLEY'S CASE*.**

In the Matter of PATRICK BRENNAN, Petitioner, and HARMAN FITZMAURICE, Respondent; and of the Act of the 5 & 6 W. 4, c. 55.

Motion on behalf of James Fitzmaurice, a third person, and present inheritor of the lands, that the receiver appointed in this matter might be discharged, &c.

The petitioner was the assignee of a judgment for £992. 2s. 6d., obtained against the respondent, Harman Fitzmaurice, in Michaelmas Term, 1806; and on his petition in this matter, a receiver was appointed in January, 1839, over the respondent's estate, producing about £300 per annum. In the month of July following, the respondent died. The receiver still continued in receipt of the rents; but no step was taken to revive the proceedings until after the notice of the present application, when a cross-notice was served of a motion on the part of the petitioner, to continue the receiver.

It appeared, that by articles of agreement entered into before the marriage of Harman Fitzmaurice (the respondent's grandfather), with Margaret Fitzgerald, and bearing date the 18th of December, 1732, it was agreed that the several lands therein mentioned, of which the said Harman was seized in fee (comprising, with several others, the lands over which the receiver was appointed in this matter), should be conveyed to the use of the said Harman for life, with remainder, subject to a provision for the said Margaret, to the first and every other son of the marriage in tail male.

James Fitzmaurice, the first son of the marriage of the said Harman and Margaret, some time in the year 1755, married Catherine Moore; and by deed of the 7th of July, 1756, purporting to be in pursuance of certain articles of agreement prior to the marriage, a trust term for 99

Where, in a petition matter under the judgment act, a receiver being appointed, and the respondent having died shortly afterwards, the respondent's eldest son claiming as tenant in tail, came in and applied that the receiver might be discharged, upon the ground that the respondent was only tenant for life;—the Court entertained and decided upon motion, a serious question of *estate*.

By post-nuptial articles of 1760, reciting the marriage of J. and C., his then wife, and that they then had issue of their marriage two sons, H. (the respondent), and

T., and one daughter, M., J. covenanted, in pursuance of articles before marriage, and for other valuable consideration, to settle his estate to the use of himself for life, without impeachment of waste; remainder to trustees, to preserve, &c.; and after decease of J. (subject to a jointure), to the use of H. and his assigns for his natural life; and after his decease, "to the heirs male of his body:" in default of such issue, "to T. and his assigns "for his natural life; and after his decease, to his issue male:" remainder to the third, fourth, and other sons of J. and C., to be begotten, if any, successively, &c., and the heirs male of their respective bodies; remainders over. Power to J., H., T., or any of the issue male of J. and C., to be begotten, who should become seized under the limitations, to make leases for three lives or thirty-one years, at best rent, without fine; power to H. and such other of said issue male, as, &c. should become seized, to jointure not exceeding £150.

Held—That H. (the respondent) took an estate for his life only.

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years, of all the lands mentioned in the articles of 18th December, 1732, was created to secure a jointure of £300 per annum, in lieu of dower, for the said Catherine, from and after the decease of the said James, for her natural life.

In the year 1757, Harman the elder being then dead, the said James, his eldest son, suffered a recovery, and became seized in fee of all the lands before mentioned; and in 1760, the said James and Catherine conveyed in fee a portion of them to one Bateman, the purchaser, and covenanted to levy a fine of the lands sold to the use of him and his heirs, discharged of all incumbrances, &c.

Contemporaneously with the execution of the conveyance to Bateman, by indenture of 26th of April, 1760, the said James Fitzmaurice, of the first part, the said Catherine, his wife, of the second part, and trustees on his behalf, of the third part, after reciting the articles of 18th December, 1732, and that the said Harman Fitzmaurice therein mentioned was dead, and that the said James was his eldest son, issue of the marriage, and had intermarried with the said Catherine, *by whom he then had issue two sons, Harman (the respondent), and Thomas, and one daughter, Margaret*; and articles of agreement entered into prior to the marriage of the said James and Catherine; and the deed of the 7th of July, 1756, in pursuance of those articles; and the sale, or agreement for a sale of a portion of the estate to Bateman, whereby the security for the jointure of the said Catherine was diminished; and that the said James was then willing, in pursuance of the former articles, not only to secure the jointure of £300 for the said Catherine, if she should happen to outlive him, but also to make a provision for his children by the said Catherine, and to settle and assure the unsold lands, tenements, &c. to and upon the several uses, intents and purposes following:—It was witnessed, that the said James Fitzmaurice, as well for and in consideration of his said marriage, &c. and of the marriage portion of the said Catherine by him had and received, and also in consideration of the said Catherine joining the said James in levying a fine, &c., and of 5s. by the trustees paid, &c. he the said J. Fitzmaurice did, for himself, his heirs, executors and administrators, *covenant, &c.*, to and with the said trustees, their heirs, executors and administrators, that he the said James Fitzmaurice or his heirs should and would, when thereunto requested, at his or their proper costs, &c. settle, convey, and assure the said lands of, &c. (the unsold lands, comprising, with several others, those over which the receiver was appointed in this matter), and the reversion and reversions, remainder and remainders, and the rents, issues, and profits of all and singular the said premises, with their appurtenances, and all his the said James's right, title, and interest therein, unto the said trustees, and the survivor of them, and the heirs and assigns of such survivor, and to such other trustees as should be thought

necessary, to such uses, upon such trusts, &c., as thereafter declared concerning the same, "or as near as might be, so far as deaths of parties and other contingencies would admit;" that is to say (subject to the provision for the widow of Harman under the articles of 18th Dec. 1732), upon trust, that they the said trustees, and the survivor of them, and the heirs and assigns of such survivor, should permit and suffer the said James Fitzmaurice to take and receive the rents, issues, and profits of the said lands, &c., for and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate to the use and behoof of the said trustees, and the survivor, &c., to preserve contingent remainders; and from and after the decease of the said James Fitzmaurice (subject to an annuity for the widow of Harman, the elder, and the further annuity of £300, to be payable to the said Catherine, in case she should survive the said James, half-yearly, from and after his decease, for her natural life, with proper remedies for the same, by distress and entry, 'and security by a term of years, to trustees, to be 'for that purpose named by the said Catherine')—"To the use and behoof "of the said Harman Fitzmaurice (the respondent), the said eldest son of "the said James Fitzmaurice, and to permit and suffer the said Harman "and his assigns, *during the natural life of the said Harman*, to take the "rents, issues, and profits of the said premises to his and their own use, "and from and after the decease of the said Harman, *to the use and "behoof of the heirs male of the body of the said Harman, lawfully to be "begotten;*" and in default of such issue, to the use of Thomas, the second son, &c. for his natural life, and from and after his decease to the "issue male" of the body of the said Thomas, to be lawfully begotten; and for want of such issue, to the use of the third, fourth, fifth, and sixth and every other son of the said James and Catherine, successively, &c., and the several heirs male of their respective bodies, &c.; remainder to the said Margaret and such other daughter or daughters as the said James should have by the said Catherine, if any, share and share alike; and if no other daughter save the said Margaret, then to the said Margaret, her heirs and assigns for ever; and if the said Margaret should die before marriage, and there should be no other daughter, then, &c. to the said James, his heirs and assigns, for ever. Provided always, &c., that the said James should have power, by sale or mortgage of a competent part of the estate agreed to be settled, to raise £2,000 for payment of debts, and also to charge the estate with a jointure of £100 per annum for any after-taken wife; and also that the said trustees, &c., should have power to raise by mortgage the sum of £3,000 for younger children of the said James and Catherine, to be divided as the said James should appoint; also, that it should be lawful "for the said James Fitzmaurice, the said "Harman Fitzmaurice (the respondent), and Thomas Fitzmaurice, or "the issue male of the said James by the said Catherine, to be begotten, "or any of them, who, by virtue of the limitations aforesaid (should)

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"become seized of the said premises, to make leases of the said premises, "or any part thereof, for any term not exceeding thirty-one years or "three lives," without fine, &c.; also, that it should be lawful for the said Harman Fitzmaurice (the respondent), and such other of said issue male as by virtue of the limitations should become seized, "to make or "settle a jointure not exceeding £150 sterling yearly, upon any wife, "payable out of the said premises."

The foregoing instrument was registered in two days after its execution. In the year 1780, the said James and the respondent, who had then lately attained his age, covenanted to ratify and confirm its provisions; and in 1784, for valuable consideration, James assigned all his estate to the respondent. In 1796, on the marriage of the respondent, a settlement was executed, whereby, after reciting the articles of 26th of April, 1760, the respondent merely charged the estate with a jointure of £150 for his wife, in execution of the power given to him by the said articles, but did not affect to settle or otherwise charge the lands. However, during the lifetime of his father, in the year 1809, having been advised that it was competent for him so to do, he suffered a recovery of all the lands mentioned in the articles of 1760; and the single question in the present case was, whether the respondent took an estate tail, or an estate for his life only, under the articles of 1760?

It appeared that the respondent's father died in the year 1813, having previously, in execution of the power above stated, appointed, among his younger children, the sum of £3,000, provided for them by the articles of 1760; and in the year 1814, the said younger children filed their bill against the respondent in the Court of Exchequer, to raise the said sum of £3,000 by sale of a competent part of the estate. To this bill Brennan, the father of the petitioner, being conuisee of the judgment in the petition in this matter mentioned, was made a party, as he had obtained a grant in custodiam on foot of said judgment, and gone into possession thereunder; and by a supplemental bill, filed in the year 1825, the said Harman's then eldest son (since dead without issue) was made a party, and he, by his answer, claimed to be first tenant in tail under the articles of 1760. In May, 1827, there was a final decree, directing a sale of the lands for payment of the charge of £3,000; and also directing that Harman's eldest son, who claimed as tenant in tail, should have his costs out of the produce of the sale; and that the said Brennan, the judgment creditor of Harman, should be at liberty to add his costs in the cause to his debt, &c.

Mr. Edward Burroughs, for James Fitzmaurice.—The respondent's title to the lands over which the receiver has been appointed was under the articles of 26th of April, 1760. Those articles, although post-nuptial, were for valuable consideration, and in pursuance of articles before

marriage. They have ever since been acknowledged, and cannot now be questioned. The Court has, therefore, to consider whether under those articles, the respondent was entitled to more than an estate for his life only. The decree of 1827, in the Court of Exchequer, was substantially a decision upon the very question, and between the parties now before the Court; for the respondent's eldest son, who claimed as first tenant in tail under the articles of 1760, was ordered his costs out of the produce of the sale of the inheritance, and was thus recognised as a necessary party as first tenant in tail; but as to Brennan, who then represented the judgment now vested in the petitioner, it was ordered that he should be at liberty to add his costs in the cause to his debt, to be recovered out of Harman's life estate, according to the rule, that incumbrancers upon a life estate shall have their costs out of that estate, and not out of the produce of the sale of the inheritance. *Exnis v. Brady* (a).

The articles of the 26th April, 1760, are executory. James Fitzmaurice, the settlor, did not thereby convey, but merely covenanted to convey on the trusts therein, "or as near as the deaths of parties and other contingencies would admit." The immediate motive of the settlor appears to have been, that he might provide a jointure for his wife, for whom it was thereby agreed that the jointure should be secured by a trust term, to be limited to trustees, to be for that purpose named by the wife; thus leaving the number of years in the term, and the trustees to be named, uncertain. Therefore, those articles are no more than heads or minutes of instructions for a conveyance, which the Court will construe according to what appears to have been the intention of the parties, and not according to what might be the legal effect of the words, if occurring in a deed. *Austin v. Taylor* (b); *Fearne Cont. Remrs.* p. 90. The estate expressly given to the respondent, who was born at the date of those articles, and named in them, was for his natural life only; and although it is declared, that after his decease, the trusts should be to the use and behoof of the heirs male of his body, &c., which, according to the rule in *Shelley's Case*, should give to the respondent an estate tail, it is plain that such was not the intention of the parties; for the same leasing power is given to James and his two sons, Harman (the respondent) and Thomas—viz., to make leases for three lives or *thirty-one* years, which is less extensive than the 10 *Car.* 1, st. 3, c. 6, *Ir.* would have given to a tenant in tail;* and the limited power of jointuring given to the respondent, is also inconsistent with the intention of giving him the power of disposing of the inheritance. Accordingly, upon the respondent's marriage in 1796, a settlement was exe-

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(a) 1 Dru. & Wa. 720.

(b) 1 Eden, 366.

* *i. e.* For three lives, or forty-one years.

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tion upon failure of heirs male, which is, "to the use and behoof of the said Margaret, and such other daughter or daughters as the said James Fitzmaurice should or might have or beget, on the body of the said Catherine his wife, if any, share and share alike; and if no other daughter save the said Margaret, then said premises to go and descend to the said Margaret, her heirs and assigns for ever." Here, the daughter born, and the daughters unborn, are to take the estate share and share alike, and if no other daughter, Margaret was to have the fee. It would be unreasonable to suppose, that the intention of the parties could have been (as to the three young infants named in those articles) to give a larger estate to the daughter than to the sons; therefore, as the intention of the parties appears to have been to give the respondent an estate tail;—or, at least, as a contrary intention does not clearly appear, this Court cannot overrule the legal construction of the limitation; *Garth v. Baldwin* (a); *Fearne on Remainders*, 125; *Jones v. Morgan* (b); *Highway v. Banner* (c); *Jervoise v. Duke of Northumberland* (d): consequently, the recovery suffered by the respondent barred the entail, and the receiver on this matter should be continued until the petitioner's demand is fully discharged.

The case stood for consideration.

Friday, November 29th.

Judgment was now pronounced as follows:—

MASTER OF THE ROLLS.

This was an application on the part of James Fitzmaurice, a third person, that the receiver in this matter may be discharged as such receiver, and that the applicant may be at liberty to go into possession. At the same time, the petitioner moved, upon cross notice, that the receiver may be continued.

It appears that the late respondent derived his title to the lands over which the receiver has been appointed, under certain articles of agreement, bearing date the 26th of April, 1760, and duly registered, by which, as it has been insisted for the motion, he took an estate for his life only. On the other hand, the petitioner contends, that upon the due construction of those articles, the respondent took an estate tail; and that, by a recovery suffered in 1809, he acquired the fee.

In my opinion, the articles in question, although post-nuptial, were not voluntary, but for valuable consideration, and bound the estate. After reciting the marriage of James Fitzmaurice (the settlor), and Catherine, his wife, and that they then had issue of their marriage two sons, Harman and Thomas, and one daughter, Margaret; and after further reciting the several considerations for

(a) 2 Ves. sen. 646.

(c) 1 Bro. Ch. C. 564, & 7 Ves. 389.

(l) 1 Bro. Ch. C. 206.

(d) 1 Jac. & W. 561.

the settlement, James Fitzmaurice covenants to settle the lands in question to the use of himself for life; remainder to trustees to preserve, &c.; and after his decease, (subject to a jointure of £300 per annum) to the use of Harman, the late respondent, and his assigns for his natural life, and after the decease of the said Harman to the use of the heirs male of his body. In default of such issue, to Thomas, the second son, and his assigns for his natural life; and after his decease, to the issue male of the body of the said Thomas. In default of such issue, to the third, fourth, and other sons of the said James and Catherine, to be begotten, severally and successively according to priority, and the heirs male of their bodies. On failure of heirs male, to the use of Margaret, the daughter, and such other daughters as the said James Fitzmaurice should have by the said Catherine his wife, if any, share and share alike (without any words of limitation); and if no other daughter but the said Margaret, then to her, her heirs and assigns for ever. The following powers are then provided:—to James, to raise £2000 for payment of debts, and to jointure any after-taken wife to the extent of £100 per annum; to the trustees, to raise £3000, for the younger children of the said James and Catherine; also, a power to make leases for three lives or thirty-one years,—which, as has been already observed, is less extensive than the leasing power given by statute to a tenant in tail,*—is given to James and his two sons, Harman and Thomas, and the issue male of the said James and Catherine, to be begotten, or any of them, who by virtue of the limitations should become seized. Lastly,—power to Harman, and such other of said issue male, as by virtue of the limitations should become seized, to jointure, not exceeding £150 per annum.

Here, the trusts are executory, and I have no doubt as to the intention of the parties. Estates for life are limited expressly to Harman and Thomas, the two sons of the settlor born at the time, and named in the articles. The limitation to Thomas, the second son, “for his natural life, and after his decease, to his issue male,” would, it is admitted, in a deed have given to him an estate for his life only: the word “issue” being, in strict legal construction, a word of purchase and not of limitation. Unquestionably, Thomas could not have been entitled to more than an estate for his life; *Dod v. Dod* (a); *Hart v. Midalehurst* (b); and it can scarcely be doubted that the intention of the parties was to give the same estate to Harman as to Thomas. The same powers are given to both;—powers, apparently inconsistent with the intention of

(a) Amb. 274.

(b) 3 Atk. 371.

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* The 10 Car. 1, st. 3, c. 6, *Ir.* enables tenant in tail to make leases for three lives, or forty-one years. In *Baile v. Coleman*, 2 Vern. 670, the leasing power was more extensive than that given by statute.

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giving estates tail. I do not think any satisfactory argument as to the intended estates of Harman and Thomas, arises from the circumstance that the powers given to them are also given to any third, fourth, or other sons to be begotten, to whom the limitation is simply, *to them and the heirs of their bodies*: for, if upon the one side the proviso as to the powers includes the issue male to be begotten, it includes upon the other James Fitzmaurice the settlor, as to whose estate for his life only, it is admitted, there could not be a question. The estate for life is given expressly to those only who were then in being and named in the articles. The ultimate remainder to the daughter affords no key to the intention of the previous limitations to the sons. When in marriage articles I find an estate for life expressly given with powers inconsistent with an estate tail, I think I have irresistible evidence of intention that the estate to be taken was to be for life only. I will not say that either the clause giving expressly an estate for life;—or the leasing power, though less extensive than a tenant in tail should have by law;—or the limited power of jointuring,—could any of them singly coerce the Court to the conclusion, that a life estate only was intended; but, *quæ non prosunt singula juncta juvant*.

It is not necessary in this case, that I should go at any length into the doctrine of executory trusts. In general, when it is stated in marriage articles, that lands are to be limited to a party and his assigns "for his natural life, and after his decease to the heirs of his body," this Court will consider the latter words as words of purchase and not of limitation, and effectuate the intention of the parties by a strict settlement,* notwithstanding the legal operation of the words used. There are a few exceptions, as in the case of *Highway v. Banner* (a), where it was agreed that the lands of an intended husband should be settled to his use for life; remainder to the intended wife for life; remainder to the heirs of *her* body. There, as the wife could not alienate,† and as the evidence of intention in the words giving her a life estate, is rebutted or rendered doubtful by the context, the Court followed the legal construction, and held that "heirs of her body" were words of limitation giving to the wife an estate tail. With such exceptions, the general rule already mentioned was established in a case

(a) 1 Bro. Ch. C. 504, and 7 Ves. 889.

* The case upon articles is stronger than upon a will: *Trevor v. Trevor*, above cited. In a very recent case in England, upon a devise to the separate use of a married woman for life; remainder to her husband for life; remainder "to the heirs of her body in tail;" remainders over; accompanied by a declaration "that testator intended all the aforesaid limitations to be in strict settlement,"—It was held that the wife took an estate tail: *per* Lord Langdale, in *Douglas v. Congreve*, 1 Beav. 52.

† Her estate inalienable during coverture without concurrence of husband; and, being *ex protutione viri*, inalienable afterwards by 11 Hen. 7. See *Fearne Cont. Rems.* p. 90 *et seq.*

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not unlike the present, *Trevor v. Trevor* (a), by a decision afterwards affirmed upon appeal by the House of Lords, (b).

In the present case, I am perfectly satisfied that the parties to the articles of 1760, intended that Harman Fitzmaurice should take an estate for his life only; and I am, therefore, of opinion that he was entitled to no more, and that the receiver must be discharged.

ORDER:—That the receiver be discharged as such receiver, and pass his account, distinguishing thereby the sums received on account of rents due in the lifetime of the respondent, Harman Fitzmaurice, and the sums, if any, received on account of rents which accrued due since his death.

Refuse the motion of petitioner.—No costs.

(a) 1 P. Wms. 622.

(b) 2 Bro. Ca. Parl. 122.

Friday, Nov. 22d.

TENANT UNDER THE COURT—DETERMINATION OF TENANCY.

JOHNSON v. REARDON.

MOTION, that a writ of restitution might issue, directed to the sheriff of the county of Cork, to restore E. H. Reardon and his under-tenants to the possession of the lands of Banemore, sold, under the decree in this cause, to Thomas Leader, Esq., who, under an injunction issued by him as purchaser, took and still held the actual possession.

The present applicant, who was the principal defendant in the cause, and represented an interest for lives renewable for ever in the lands, obtained a lease of them under the Court, for seven years pending the cause, from the 25th of March, 1831, at the yearly rent of £230. He sub-let them, and had a profit rent of about £100 per annum. The lands were sold under the decree on the 23d of April, 1838; and as the lease

A lease under the Court, for seven years pending the cause, being about to expire, the lands were sold under the decree, and the purchaser stated that he did not wish a new letting, but that the receiver should levy the accruing rents from the tenants, until

the conveyance to him should be executed. After the expiration of the lease, the tenant continued to occupy, and the receiver to take the rent as before, but without any express agreement as to the new tenancy. Afterwards, the purchaser, by injunction, took the actual possession, and turned the tenant out. On motion for a writ of restitution, upon the ground that a tenancy from year to year had been created, and that the tenant was entitled to a notice to quit:—*Held*, that as to tenancy under the Court, the cause is determined by the execution of the conveyance to the purchaser; and that the tenant overholding, without special agreement, held impliedly subject to the conditions of the lease; and, therefore, that his tenancy was determined by the execution of the conveyance to the purchaser.

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had then nearly expired, the receiver applied to the Master for a new letting; but as the lands had been sold under the decree, the Master declined to interfere without the consent of the purchaser. The receiver then applied to the purchaser's solicitor for instructions, and was informed that a new letting was not desired, and afterwards was told, by the purchaser himself, that he did not wish a new letting, but desired that care might be taken to levy the accruing rents from the tenants. In consequence of such instructions, there was not any new letting; and, after the expiration of the lease, Mr. Reardon and his under-tenants continued in undisturbed possession, and the receiver continued to receive the rents as before, treating the occupying tenants as Reardon's under-tenants, and passing to him, as the sole tenant, receipts for the rents received. In this manner, the rents were received up to and for the 25th of March, 1839. In September, 1839, the conveyance to the purchaser was executed, and an injunction to put him into possession having issued, he personally attended upon the execution of it on the 12th of October, and took actual possession of all the lands, permitting some of the tenants to re-occupy under special agreements, and turning others absolutely out. The question was, whether a yearly tenancy had not been created, entitling Reardon and his under-tenants to six months' notice to quit?

Mr. Leader made an affidavit, for the purpose of resisting the present application, and admitted the alleged communications with the receiver, but denied that he had ever intended to authorise a new tenancy. That, on the contrary, his intention was to prevent a new tenancy, so that when the conveyance was executed, he might have the lands at his own disposal. That at the sale, one of the inducements offered, and that which had prevailed upon him to give a much larger sum than he otherwise would have given, was, that as the lease under the Court was then about to expire, the purchaser should be put into the actual possession of the lands, and might let them immediately to tenants of his own selection, and obtain much higher rents than had been reserved by the Court.

Mr. *Blackburne*, Q. C., and Mr. *Warren*, Q. C., for the motion, contended that Leader's proceeding was harsh and irregular. He and his solicitor refused a new letting under the Court, which would have been determined immediately after the execution of the conveyance, and directed the receiver to take the rents as before. The tenancy created after the expiration of the lease should not be considered as a tenancy under the Court, but under the purchaser. The Master declined to interfere; the conduct of the receiver was strictly ministerial; and a tenancy without lease, or any security for the rent, has been created by the express direction of the purchaser. The rent has been paid with


the greatest punctuality; but if, after the arrangement of the purchaser's own choosing, the tenants had been in default, and loss had ensued, the purchaser must have borne it, nor could he have had any right to ask this Court to interfere. The present statement as to his intentions cannot be attended to. If he was ignorant of the consequence of his instructions to the receiver, his very intelligent solicitor, who repeated the same instructions, cannot be supposed to have labored under such ignorance. The question here is, what had the tenants a right to suppose the intention to have been? Under the circumstances, they may, and perhaps would, have refused to hold by a new letting under the Court; or, they may have deemed that the rents they have been paying, though not unreasonable where the tenancy was secure, would have been much too high for a tenure which, for aught that they could tell, might be determined, without notice, in three months, or three days. If, upon the execution of the conveyance to the purchaser, Reardon had gone to him and said—"I have paid my rent up to the last gale day, and I will hold no longer;" it is clear that Leader may have answered, "After the expiration of your lease, by consent you continued in possession, paid two gales of rent, and became tenant from year to year: therefore, I will not allow you to determine your tenancy without giving me that notice to which, by law, I am entitled." The obligation is reciprocal: consequently, a writ of restitution ought to issue.

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Mr. Collins, Q.C., contra.—The purchaser's affidavit states that he would not have given so large a sum, but for the inducement offered at the sale, that upon the conveyance being executed, he should be put into the actual possession of the lands, clear for tenants of his own selection. The tenancy under the Court could not have ceased before the conveyance was executed. The sale to the purchaser was conditional—if a good title could be made out. Until conveyance executed, the purchaser had no right or power to create a tenancy, and it was uncertain that he ever should. He distinctly denies that he gave any authority to create a tenancy from year to year. The simple state of the case is this:—A lease under the Court, for seven years *pending the cause*, having expired, and there being no new agreement of any kind, the tenant continues to occupy and pay rent as before. Upon this case two questions may arise:—First, whether the mere acceptance of rent, without any special agreement, from a person continuing in possession, after his lease has expired, creates a tenancy from year to year? Secondly, whether, in the present case, if a tenancy from year to year has been created, the tenant was thereby entitled to a notice to quit? In *Doe d. Cheny v. Batten (a)*, Lord Mansfield, with the concurrence of the rest of the

(a) Cowp. 243.

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Court, held, after, as he said, the question had been "extremely well argued on both sides," that the mere *acceptance of rent* by a landlord for occupation *subsequent* to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver, on the part of the landlord, of such notice. But supposing that case distinguishable from the present, and that a tenancy from year to year was created, it must have been subject to the same conditions as the previous holding under the lease. *Digby v. Atkinson* (a), *Torriano and others v. Young* (b). It was therefore a tenancy from year to year *pending the cause*, and was determined at once by the execution of the conveyance to the purchaser.

The case was ordered to stand for consideration.

Monday, Dec. 2d.

Judgment was now given as follows:—

MASTER OF THE ROLLS.

This was an application for a writ of restitution, to restore E. H. Reardon and his under-tenants to the possession of certain lands sold under the decree in this cause, of which, by injunction, the purchaser has taken the actual possession.

It appears that Mr. Reardon, being one of the defendants in this cause, and representing an interest for lives renewable for ever in the lands, became tenant under the Court, by lease for seven years pending the cause. The term expired on the 25th of March, 1838, and the lands having been sold under the decree in the preceding month, there was not any new letting, but, without any express agreement of any kind, Mr. Reardon and his under-tenants were permitted to continue in occupation, and have paid two gales of rent which accrued since the lease expired.—[His HONOR here stated the substance of the affidavits on both sides.]—He now insists that a tenancy from year to year has been created by the payment and acceptance of rent accruing after the expiration of the lease; and, therefore, that he and his undertenants were entitled to a notice to quit, and that the injunction obtained by the purchaser was irregular. On the other hand, it is contended—First, that the mere acceptance of rent from an overholding tenant does not create a tenancy from year to year; and, secondly, that in the present case, there being no special agreement, if a tenancy from year to year was created, it must have been subject to the same conditions as the previous tenancy under the lease, and was, therefore, determined at once by the execution of the conveyance to the purchaser.

If, under the circumstances of this case, it appeared, however clearly,

(a) 4 Camp. 275.

(b) 6 Car. & P. 8.

that the injunction was irregular, there would still be a serious objection to the form of the relief sought; because, Reardon having taken the liberty of sub-letting without leave,—which this Court must always reprobate,—was himself not an occupying tenant; and there would, therefore, be much technical difficulty in the way of executing or directing a writ of restitution to restore him to the possession. But I have no doubt of the regularity of the injunction. It is not at present necessary to consider the legal effect of the mere acceptance of rent from an overholding tenant, as my opinion is, that even if a yearly tenancy was created, it was subject to all the conditions of the preceding lease, so far as they were applicable. In *Digby v. Atkinson* (a) (which is a case precisely in point), the language of Lord Ellenborough is very strong, notwithstanding that, after the expiration of the lease in that case, the rent was, by agreement, greatly increased. *Torriano and others v. Young* (b), is also an authority to the same effect. Therefore, as the lease under the Court for seven years *pending the cause*, was liable to be determined at any time with the cause, the subsequent tenancy had the same liability; and as it has always been considered that, so far as a tenancy under the Court is concerned, the cause is determined by execution of the conveyance to the purchaser, I must hold that the injunction obtained by Mr. Leader was perfectly regular. However, as doubts may have been reasonably entertained upon the subject, I shall, under the circumstances,

Refuse the present application, without costs.

(a) 4 Campb. 275.

(b) 6 Car. & P. 8.

See *Trotter v. Ellis*, 2 Law Rec. O. S. 222; *Dunne v. Farrell*, 1 Ball & B. 122.

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Wednesday, Nov. 18th.

SOLICITOR'S LIEN—TRUST FOR PAYMENT OF DEBTS—
HEIR—DEVISEE—ASSETS.

MORGAN and others v. SCOTT and others.

R. S. devised his real estate, subject to his debts and legacies, to his only son, J. S., in tail, and died in 1773. In 1802, J. S. deposited the title-deeds with his solicitor, and, prior to the year 1813, incurred costs to a large amount in suffering a recovery, and in the causes of A., B. and C. (the testator's younger children), instituted to raise charges to which they were entitled under the will; &c. &c. In 1813, M., a specialty creditor of the testator, on whose debt J. S. paid interest until 1811, filed his bill against J. S. and A., B., and C., &c., praying for execution of the trust for payment of debts, and that his demand might be deemed charged on the testator's real estate. Further proceedings in the causes of A., B., and C. were restrained by the decree in this cause, under which they were directed to prove their demands. J. S. having sold a larger portion of the estate, suffered the bill to be taken *pro confesso* against him, and died insolvent before the final decree. Some time before the final decree, the solicitor of J. S. became concerned in this cause for the representative of B., and now refused to bring in the deeds for a sale under the decree, until J. S.'s costs, incurred between the years 1802 and 1813, should be first paid.—A., B., and C. were reported in priority to M., for whose demand the residue of the fund would be insufficient: therefore, the question as to the solicitor's lien was between the solicitor and M.

UNDER an order in this cause, J. Norman brought in a number of title-deeds of the defendant John Scott, without prejudice to such lien, if any, as the said J. Norman might have for costs, as the solicitor of the said John Scott. The question now was, whether Mr. Norman had a lien for costs, as solicitor of John Scott, upon the fund in Court, which was a sum of £300 (impounded to abide the settlement of the question), and part of the produce of the sale of the real estate to which the deeds related, and which had been devised to the said John Scott in tail, subject to the debts and legacies of the testator Robert Scott. The Master having reported, under the order of reference to him, that Mr. Norman had not any lien as against the said £300, he now moved to vary the report. At the same time, the plaintiffs moved, on cross-notice, that the £300 should be paid out to them.

The original bill in this cause was filed in the year 1813, to raise the amount due upon the bond of Robert Scott, deceased, bearing date 14th December, 1770, and upon which interest had been regularly paid until the year 1811, praying that the trusts of his will, for payment of his debts, might be carried into execution, and that the plaintiff's demand might be deemed and taken to be charged on his real estate, &c. To this bill John Scott, who was the only son of Robert Scott, and the representatives of the younger children of Robert Scott, and several others, were parties defendant.

By Robert Scott's marriage settlement, bearing date the 12th of May, 1768, his real estate was conveyed, upon trust, to the use of himself

praying for execution of the trust for payment of debts, and that his demand might be deemed charged on the testator's real estate. Further proceedings in the causes of A., B., and C. were restrained by the decree in this cause, under which they were directed to prove their demands. J. S. having sold a larger portion of the estate, suffered the bill to be taken *pro confesso* against him, and died insolvent before the final decree. Some time before the final decree, the solicitor of J. S. became concerned in this cause for the representative of B., and now refused to bring in the deeds for a sale under the decree, until J. S.'s costs, incurred between the years 1802 and 1813, should be first paid.—A., B., and C. were reported in priority to M., for whose demand the residue of the fund would be insufficient: therefore, the question as to the solicitor's lien was between the solicitor and M.

Held:—1. That the costs now demanded, if rendered necessary by the will, should have been claimed upon the hearing of the cause, and provided for by the decree; and that, in this view of the case, the claim could not now be entertained.

Held:—2. That as it did not appear that any of the costs had been incurred *before* the title-deeds came into the solicitor's possession, and as he had full notice of the will when the costs were incurred, he was bound by the trust, and had not any lien upon the deeds as against M., the specialty creditor of the testator, who had proceeded *bona fide*, and with due diligence.

for life; then to secure a jointure of £300 a-year for his wife Alice; and, after the death of the said Robert and Alice, upon trust, "as to the yearly sum of £300 of the rents and profits of said lands, and no more, to the use of the first son of the said Robert and Alice, and the heirs of his body;" and for want of such issue, to every other son of the marriage in tail male successively; with ultimate remainder in fee to the said Robert: and in case the said Robert should die, leaving younger children issue of the marriage, in trust, to raise £5000 for their portions.

By his will, made shortly after the foregoing settlement, and a codicil in 1773, Robert Scott charged his estate with the sum of £1000 for his younger children, in addition to the £5000 already charged; and after giving several other legacies, he devised all his real estate, *subject to the payment of his debts and legacies*, to his first and every other son whom he might have by his wife Alice, successively in tail male. He died in 1773, leaving the defendant John Scott, his only son, and three daughters, his younger children, surviving him, all of whom respectively attained the full age of twenty-one years.

In 1799,* the suit of *Roche v. Scott* was instituted by the representatives of one of the daughters, to raise her share of the £6000 charged on the estate. Within a few years afterwards, another of the daughters and her husband filed their bill (being the cause of *Studdert v. Scott*), to raise her portion of the same charge.

In 1808, the defendant John Scott suffered a recovery, and sold a portion of the devised estate, exceeding in value his estate or interest under the marriage settlement of his father.

In 1816, a decree to account was pronounced in the present cause, and as the several parties in *Roche v. Scott* and *Studdert v. Scott* were defendants in this cause, all further proceedings in those causes were restrained, and the parties directed to go in and prove their demands under the decree in this cause. The accounts having been taken accordingly, there was a final decree for a sale in this cause, on the 8th of June, 1821.

The defendant John Scott never answered in this cause, but suffered the bill to be taken *pro confesso* against him, and died insolvent some time before the final decree was pronounced. The remaining lands were now sold under the final decree, to discharge the debts and incumbrances created by Robert Scott; and as the several other incumbrances of the testator's estate were reported and paid in priority to the plaintiffs, the residue of the fund was insufficient for their demand:

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* This date was stated by the counsel without contradiction, but it did not appear from any of the documents used upon the motion.

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therefore, the question as to Mr. Norman's lien was as between him and the plaintiffs.

Mr. Norman was attorney and solicitor for John Scott, and prepared the deeds, &c. for the recovery suffered in 1808; and in the same year put in J. Scott's answers in the causes of *Roche v. Scott* and *Studdert v. Scott*. In this cause, he became concerned some time before the final decree, as solicitor for the Rev. R. Knipe, who was the representative of one of the younger children of Robert Scott, claiming her share of the £6000 charged on the estate. Some payments had been made by John Scott to Mr. Norman on account of costs, but a large balance still remained due to him for costs of John Scott, incurred prior to the year 1812, in the causes of *Roche v. Scott* and *Studdert v. Scott*, and in other suits and miscellaneous business, for which he claimed to have a lien on the title-deeds deposited with him by John Scott. His charge, filed under the order of reference to the Master, stated, that in the year 1802 he was retained as the attorney of John Scott, and so continued until J. Scott's death, which happened in or about the year 1820; that, in the course of this employment, a large number of J. Scott's deeds and papers came into his hands; that there having been a decree for a sale in this cause, he lodged with the Master, pursuant to an order bearing date the 13th of November, 1834, upwards of one hundred and sixty of the said deeds, leases, and documents, *without prejudice to his lien, if any, upon the said deeds*; that, by the sales under the decree in this cause, upwards of £10,000 was realised, and nearly all the deeds had been handed over to the several purchasers; and that, by an order of the 22d June, 1838, the sum of £300 had been impounded, to abide the claim of the said J. Norman for costs. The plaintiff's discharge insisted that Norman could not have any lien as against the said sum of £300, inasmuch as it was part of the sum of £1017. 16s. 11d. reported payable to them, on account of a much larger sum reported due to them on foot of a debt secured by the bond of Robert Scott, bearing date the 14th of December, 1770, and therefore prior and paramount to any demand created by John Scott; and inasmuch as the said £300 was part of the fund produced by the sale of the real estate of Robert Scott, which was devised to the said John Scott in tail, subject to the debts and legacies of the said Robert Scott.

Mr. Warren, Q. C., and Mr. Hanna, for Norman, submitted that it is for the general interest of suitors that a solicitor's lien should be favored: *Heslop v. Metcalfe* (a); *Twort v. Dayrell* (b). The plaintiffs, who now resist Mr. Norman's lien, were not originally specific incumbancers on the testator's lands*; nor did they become so by the

(a) 3 My. & Cr. pp. 188-9.

(b) 13 Ves. 197.

* See *Jefferson v. Morton*, 2 Saund. n. 4.

devise of the estate tail to John Scott, subject to the devisor's debts generally. In Sir Edward Sugden's treatise of *Vendors and Purchasers* (8th edit.), it is laid down, at p. 528, that "Where the trust is for payment of debts generally, a purchaser is not bound to see to the application of the purchase-money, although he has notice of the debts; for the purchaser cannot be expected to see to the due observance of a trust so unlimited and undefined." Although the plaintiffs' demand is so old standing, Norman knew nothing of it until they filed their bill in the year 1813. Before that time, he had no reason to suppose that any such incumbrance existed, as the title-deeds were permitted to remain in the hands of John Scott. The costs now claimed, were incurred by Norman, as the solicitor and attorney of John Scott, in the causes of *Roche v. Scott*, and *Studdert v. Scott*, and other causes and matters, prior to the year 1812; and in the course of those proceedings the title deeds were delivered to him by John Scott: therefore, his lien existed long prior to the institution of this suit, and the Court should not permit the plaintiffs to take the deeds from him without paying his costs: *Bernard v. Drought* (a). He should be considered as an equitable mortgagee without notice: *Ex parte Warner* (b); *Hockly v. Bantock* (c); and an equitable title to a mortgage is, in this Court, as good as a legal title: *Ex parte Wright* (d); *Coots on Mortgages*, p. 217-30; *Burn v. Burn* (e); *Russell v. Russell* (f); *Pain v. Smith* (g). The plaintiffs are not specific incumbrancers, but Norman is. Even if John Scott should be considered as a mere trustee for payment of debts, Norman's equitable mortgage would be good: * *Hardwicke v. Mynd* (h). At least he is entitled to so much of the costs, as were incurred by the proceedings for the due administration of the trusts of the will. Robert Scott, by devising, as he did, an estate tail subject to the payment of his debts, rendered a Chancery suit necessary, and of course, his estate liable for the costs of it.—[MASTER OF THE ROLLS. In that view of the case, are you not asking upon motion for decretal relief, and pressing an argument which should have been urged, if at all, at the hearing of the cause?—The Court would not turn us round upon the point of form, nor bind us by an accidental omission, if we really are entitled to the relief sought.†

In the discussion before the Master, the cases cited, and chiefly relied

(a) 1 Moll. 39.

(c) 1 Russ. 141.

(e) 3 Ves. 582.

(g) 2 Myl. & K. 417.

(b) 19 Ves. 202.

(d) 19 Ves. 258.

(f) 1 Bro. C. C. 269.

(h) 1 Anstr. 109.

* See *Johnson v. Kennett*, 3 Myl. & K. 624.

† See *Hackett v. Donnelly*, ante, vol. 1. p. 231.

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upon, for the plaintiffs, were *Harper v. Faulder* (a); *Ex parte Hooper* (b); and *Baker v. Henderson* (c). The first of these, *Harper v. Faulder*, was the case of a competition between two specific incumbrancers, and, therefore, was not analogous to the present. In *Ex parte Hooper*, the question was, whether a mortgagee could tack a subsequent advance to his mortgage, in virtue of a parol agreement. In *Baker v. Henderson*, the Vice-Chancellor expressly grounded his decision upon the fact, that in that case, the solicitor had not a lien, prior to the institution of the suit, for the purposes of which he obtained the deeds; therefore, that is a decision in favor of Mr. Norman's claim; as the deeds were deposited with him, and his lien upon them had been created long before the bill in this cause was filed. The same observation applies to the cases of *Furlong v. Howard* (d); and *Marsh v. Bathos* (e).

Mr. Smith, Q. C., and Mr. W. Brooke, Q. C., for the plaintiffs.—There can be no doubt that John Scott must have brought in the deeds for the plaintiffs; and the general rule both in this Court and in the Court of Exchequer is, that whenever a client is bound to produce title deeds for a third person, so also is his solicitor, although the latter may have a lien upon them for costs against his client: *Marsh v. Bathos* (e); *Furlong v. Howard* (d); *Hutchinson v. Joyce* (f). The lien for costs which a solicitor acquires upon title deeds coming into his possession in the course of his employment, is not to be classed with an equitable mortgage; especially where there was no pre-existing debt, and the costs were incurred after the deposit: *Beames on Costs*, pp. 320, 327; *Ex parte Long* (g); *Ex parte Hooper* (b). In this case the deeds were deposited with Norman, in, or shortly after, the year 1802, and the earliest item in his bill of costs is of the year 1804. Even if he should be considered as a quasi mortgagee, he could not be entitled in right of his possession of the deeds, to priority over prior incumbrancers not guilty of fraud or laches; *Harper v. Faulder* (a). Neither fraud nor laches can be imputed to the plaintiffs: they had no right to the possession of the deeds: the interest of the principal money secured by the bond, was regularly paid to them by John Scott, or those acting on his behalf, until the year 1811; and the regular payment of interest then ceasing, they filed their bill in this cause in the year 1813.

Mr. Norman's client sold and applied to his own use, a larger portion of the devised estate than in equity he was entitled to; and the

(a) 4 Madd. 129.

(c) 4 Sim. 27.

(e) Ridgw. temp. Hardw. 256.

(b) 1 Mer. 9.

(d) 2 Sch. & Lef. 116.

(f) 2 Jones, 122.

(g) 2 Mont. & Ayr. 381.

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question now is, on whom is the loss by the deficiency to fall*—on the creditor of the testator, or of the devisee? The plaintiffs were bond creditors of the testator, Robert Scott. The case of John Scott was not that of an heir taking by descent, personally liable by statute on the bond of his ancestor, and capable of alienating the lands to a *bona fide* purchaser discharged of such debts.† The effect of the devise of the estate tail to him, subject to the debts of Robert Scott, was to create a *charge*, taking the case out of the statute, and making equitable assets for the debts;‡ *Silk v. Prime* (a); *Bailey v. Ekins* (b); *Shiphard v. Lutwidge* (c). He, therefore, was a trustee for payment of debts; and Norman admits notice of the will, and was bound by the trusts. *Adair v. Shaw* (d); *Mansell v. Mansell* (e). Besides, there is here *lis pendens*; the present cause was but a graft upon the causes of *Roche v. Scott*, and *Studdert v. Scott*, in which Norman put in John Scott's answer in the year 1808, and both of which were pending when he was retained as the solicitor for John Scott in 1802, therefore, even supposing him to stand in the situation of an equitable mortgagee, he should take subject to the trusts in the deeds under which he derives.

We admit that a *bona fide* purchaser for valuable consideration need not, in general, see to the application of the purchase-money where there is not a schedule of debts. But, if the vendor is a trustee for payment of debts, and no money passes;—or, if the nature of the transaction be such that the vendor and purchaser must be aware that the money advanced is to be applicable to the purposes of the vendor and not of the trust;—there a breach of trust is committed, to which the purchaser is a party; and though he be a purchaser for valuable consideration, he will be bound by the trusts; *Watkins v. Cheek* (f). Norman had distinct notice of the will when the costs were incurred, and there is no pretence for saying that his advances were for the purposes of the trust. It is also to be remembered that the decree in this cause expressly declares that the plaintiffs' demand shall have priority over the actual mortgage made by J. Scott to the defendant, S. Reid, in 1811.

The case stood for consideration.

(a) 1 Bro. C. C. 140.

(b) 7 Ves. 323.

(c) 8 Ves. 28.

(d) 1 Sch. & Lef. 262.

(e) 2 P. Wms. 681.

(f) 2 Sim. & Stu. 205.

* See *Nixon v. Hamilton*, ante, vol. 1, p. 57.

† See *Jefferson v. Morton*, 2 Saund. (n) 4 p. 7, et seq.

‡ See *Spackman v. Timbrell*, 8 Sim. 253.

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THE MASTER OF THE ROLLS now delivered his judgment in this case, and after stating the Master's report under the order of reference, and the facts already set forth, his Honor proceeded as follows:—

In this case, the question is as between Mr. Norman and the plaintiffs; and we must consider attentively what are the rights of the plaintiffs in this cause. By their bill, they pray that the trust, created by the will of Robert Scott for payment of his debts, may be carried into execution, and that their demand may be deemed and taken to be charged on his real estate; also for the usual accounts of the real and personal estate of the testator.

To this bill, John Scott and Samuel Reid (to whom J. Scott mortgaged the devised estate by deed of the 11th of November, 1811), together with the representatives of the three younger children of the testator, and several others, are defendants. The cause was heard on the 17th of June, 1816; and it is not a little remarkable that the decree then pronounced declares, that after the demands of the younger children, and certain other persons, entitled under the marriage settlement and will of Robert Scott, the plaintiff's demand "is entitled to priority," and Reid's mortgage is expressly postponed to it. It was further ordered that the trusts of Robert Scott's will be carried into execution; and that the proceedings in the causes of *Roche v. Scott* and *Studdert v. Scott*,—which, like the present, were for execution of the trusts,—be stayed, with liberty to the parties to go in and prove their demands under the decree in this cause.—It does not clearly appear at what time Roche and Studdert filed their bills; but it seems to be conceded that their suits were pending in the year 1802, when the defendant, John Scott, retained Mr. Norman as his attorney.—Robert Scott's will, the trusts of which the decree orders to be executed, opens with the following declaration:—"I do, in every respect, confirm the marriage settlement entered into between me and my beloved wife Alice, and do subject all my real, freehold, and personal estate to the payment of all my just debts." He afterwards devises the estate to his first son in tail; and by a codicil, he leaves to his younger children £1000 "to be added to the £5000 already settled upon them;" and he adds, "I do hereby subject all my real and personal estate to the payment of the said sum of £6000, if my said real and personal estate were not so subjected before, after payment of all my just debts and legacies."

I need not go into the question, whether the due administration of Robert Scott's will rendered necessary all, or any, of the suits which have been instituted: for, Mr. Norman admits some payments on account of costs, and those payments may have been, for aught that I

know, for suits necessary; besides, in that view of the case, the claim for costs should have been made at the hearing, and cannot now be entertained.

But it is said, that as those costs were incurred, and the deeds had been in Mr. Norman's possession for some time before the bill in this cause was filed, his lien should have priority to the plaintiffs' demand: that the plaintiffs should not take the deeds from him without paying his costs. I cannot accede to that proposition, under the circumstances of this case. When the costs now claimed were incurred, Mr. Norman had—necessarily had—full notice of the will of Robert Scott. That is manifest from the costs themselves: for the several proceedings which are the subject-matter of charge grew out of the rights of John Scott under the will, by which he was entitled to an estate tail, subject to the debts and legacies of the testator, and became a trustee to the extent of those debts and legacies. What might have been Mr. Norman's right for costs incurred before the deeds were deposited with him, and before any suit was instituted for execution of the trusts, I do not say; but such is not the present case. Here, it does not appear that any costs were incurred before the deposit of the deeds; and it must be presumed that the deeds were deposited by the client, and received by the solicitor, subject to, and for the purpose of, the trusts: otherwise, there would have been a breach of trust by the deposit, and the solicitor, consant of the trust, must have been a party to the breach of it. I am, therefore, of opinion, that the present case is not distinguishable in principle from those in which, pending a suit, the title-deeds are deposited with the solicitor of a party for the purposes of the suit, and my order must follow the decisions in *Marsh v. Bathoe* (a); *Furlong v. Howard* (b); *Hutchinson v. Joyce* (c), *Baker v. Henderson* (d). The last-mentioned case has a strong resemblance to the present.

A solicitor's lien is to be favored as between him and his client; and the Court has established several Rules* for the protection of his rights.

(a) Ridgw. temp. Hardw. 256.

(b) 2 Sch. & Lef. 115.

(c) 2 Jones, 122, and 5 Law Rec. N. S. 37.

(d) 4 Sim. 27.

* One of those Rules lately established, and the occasion of it, may be mentioned here. Some time since, a party having the carriage of a decree for a sale, moved for a reference to the Master to inquire, &c., and to settle certain conditions of sale, one of which was, that the purchaser should not require certain title-deeds of ancient date, which were stated to have been irrecoverably lost. The order was granted, and the sale was accordingly effected without the deeds. It afterwards appeared that the deeds in question were in possession of a former solicitor, to whom a considerable sum was due for costs, and whose only chance of payment was by his lien upon the deeds. Of course, this chance was extinguished by the condition of sale dispensing with the deeds, and thereby evading the question as to the solicitor's lien upon them. In consequence of which, his Honor established the Rule, to which he has rigidly adhered ever since, that, in every case of a reference to the Master as to such a condition of sale, it must be part of the order, that he shall inquire, whether due diligence has been used to discover in whose hands, or where, the deeds in question might be found, and that he shall not settle such condition of sale, if, upon inquiry, he should find that by due diligence the deeds might be obtained.

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But the favor with which the Court regards his claim is not to be carried to the dangerous extreme at which prior rights would be divested. If the lien of a solicitor could be maintained against prior creditors, might it not be used as an instrument of the grossest oppression and fraud, ready to the hand of every unprincipled debtor? How mischievous might be the consequence, if a man, indebted perhaps over the value of his estate, might hand his title-deeds to his attorney, and give a lien upon them to any amount of costs he could find a pretext for incurring? I am satisfied that the spirit and intention of the late Master of the Rolls' order in *M'Cann v. Beere* (a) were not inconsistent with the decisions just mentioned;—that there was no more intended by it than to give the solicitor a chance of immediate payment from his client, by making the order for the production of the deeds (probably under some special circumstances), in the first instance upon the client. If, however, it is to be considered as conflicting with *Furlong v. Howard* and *Hutchinson v. Joyce*, it could not, in my opinion, be followed. It is true, that by fraud, or gross negligence,—which equity regards as on a footing with fraud,—priority and other rights may be forfeited or lost. The decision in *Bernard v. Drought* (b) does no more than affirm that principle. In that case, Sir Anthony Hart—restating the rule laid down by Lord Redesdale in *Ex parte Nesbitt* (c)—observed, “It is said “that a tenant for life cannot give a lien on muniments of title; and “that is true, except so far as binding his own interest; but if a purchaser will permit a vendor to retain the deeds, and he pledges them, “although this be a fraud in the vendor, I cannot take them away at the “instance of one, who was instrumental, by his negligence, from parties “not contaminated with such fraud.” That decision has no application to this case, in which the plaintiff's proceeding has been with due diligence. Nothing less than gross negligence, or something amounting to fraud on the part of a prior creditor, can postpone his demand to any which subsequently accrued. To hold that a tenant for life, or devisee taking a limited interest, could, as of course, create a charge upon the muniments of title against persons having prior rights, would give such opportunities to fraud, that there could be few cases in which settlements would not be insecure, or in which the intentions of a testator, and the rights of parties deriving under his will, might not be totally defeated.

Therefore, without giving any opinion upon the question, whether or not Mr. Norman should be considered as an equitable mortgagee, I think his claim cannot be in a better situation than that of S. Reid, the actual

(a) 1 Hog. 129.

(b) 1 Moll. 38.

(c) 2 Sch. & Lef. 279.

mortgagee, whose demand is expressly postponed, by the decree in this cause, to that of the plaintiff's.*

ORDER:—Refuse Mr. Norman's motion,† and let the deposit be paid to the plaintiffs for the costs of the motion.

On plaintiff's motion; Order for payment to them of the £300.

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* See *Eland v. Eland*, 1 Beav. 235; and *Livesay v. Harding*, *ibid*, 343.

† See the following case; see, also, *Plumtre v. O'Dell*, *ante*, vol. 1, p. 113.

Wednesday, Nov. 21st.

SOLICITOR—LIEN.

HARGRAVE v. HOLLAND and others.

MR. HENDERSON, for the plaintiff, moved that Edward Doherty, late solicitor of the defendant W. H. Kingston, might bring in and lodge in the Master's office, the several deeds, leases, and documents relating to the lands about to be sold under the decree in this cause, in his possession, custody, or power, subject to such lien, if any, as the said E. Doherty might have for costs.

The plaintiff was a judgment creditor of Thomas Holland, deceased, and had a decree for a sale of his real estate for payment of the debt, &c. The defendant Kingston represented a portion of the real estate of Thomas Holland, and, some time after the institution of this suit, was discharged as an insolvent debtor. His assignee was made a defendant, and, by his answer, referred to the schedule filed by Kingston in the insolvent matter. In this schedule, Kingston set forth, *inter alia*, that the several title-deeds, &c., relating to his property, and that derived under Thomas Holland, "were in the possession of his solicitor, Edward Doherty, of Bandon, in the county of Cork, who claimed a lien on "them for costs."

Where a solicitor receives, in his professional character, muniments of title from his client, the Court has jurisdiction, under a decree binding the client, to order the solicitor to bring in the deeds, although he never appeared in the cause, and it is uncertain at what time the deeds came into his possession.

There was not any proceeding on the part of Kingston in this cause, except the entry of an appearance, to which the name of Mr. Doherty did not appear, but that of another solicitor, who, as it was alleged, was Doherty's correspondent, and occasionally transacted business for him in Dublin. On the 5th of November, instant, a requisition, signed by the Master, was duly served on Mr. Doherty, requiring him to lodge, within one week, the several deeds mentioned in the requisition, but he had not done so. There was not any appearance for him upon this motion.

Saturday, November 23d.

CONSENT—RECITALS IN—RULE OF COURT.

GUMMING and Wife v. RYAN and others.

A consent, which recites, as facts, a matter of legal inference, without shewing the grounds of it, will not be made a rule of Court, when the correctness of the inference is material.

Where, for the purpose of avoiding further litigation, it was consented that the receiver in the cause should perform certain duties of trust and general agency not contemplated by the rules regulating the duties of a receiver of this Court, it was declared, upon the order making the consent a rule of Court, that the receiver should thenceforth be considered as the private agent of the parties.

Mr. CHARLES H. WALKER moved that a consent in this cause, signed by all the parties, might be made a rule of Court. The object of the consent was, that certain insurances might be effected by the receiver, upon the life of the principal defendant, on behalf of the several creditors, parties in this cause; and that the rents should be regularly applied, in the first place, in payment of the premiums. It recited, *inter alia*, that "Whereas the defendant J. W. Ryan, is only tenant for "life," without shewing how his estate was limited.

MASTER OF THE ROLLS.

I cannot make a consent a rule of Court, when it recites as facts matters of law material to the case. Here it is recited, "that the defendant J. W. Ryan is only tenant for life;" and upon this recital the propriety of the whole consent depends; yet this is a matter of legal inference, as to which the parties may be mistaken, and, for aught that I can tell, the defendant J. W. Ryan may be tenant in fee. However, as, under the circumstances which have been detailed, the consent would be a very proper one, if the defendant be only tenant for life, I shall take the papers home with me; and if, upon examination, the case appears to be proper for it, I shall make the order as on the motion, and treat the consent as a document referred to in the notice. But I desire it may be generally understood for the future, that when consents recite matters of law in this manner, I will not found any rule upon them.*

On a subsequent day (17th January, 1840),

His Honor said that he had examined the documents, and thought the arrangement proposed was, under the circumstances, a very proper one; but as the office of receiver, under such an arrangement, would be different in its duties from those of the Officer of this Court, it was declared, upon the order then made, that the receiver should thenceforth be considered as the private agent of the parties.†

* See *Anon.* 6 Law Rec. N. S. 307.

† See *Bailee v. Bailee*, *ante*, vol. 1, p. 413.

NOTE. In a great many cases, during the present sittings, applications that consents might be made rules of Court could not be entertained, in consequence of the consents not having been stamped by the Clerk of the Appearances. By the 6th General Order of October, 1836, (pursuant to the 6 & 7 W. 4, c. 74), all pleadings and documents

Friday, November 29th.

**SALE UNDER DECREE—FURNISHING ABSTRACT OF
TITLE—FEE FOR OPINION OF PURCHASER'S COUNSEL.**

ALEXANDER v. CROSBIE.

A SALE was had under the decree, in this cause on the 27th of May last, and on the 30th of the same month the purchaser lodged one-fourth of the purchase-money. On the 5th of June following, a conditional order to confirm the sale was obtained, and served on the 1st of July: the statement of title was furnished on the 27th, and the remaining three-fourths of the purchase-money lodged on the 29th of July: and the rule to confirm the sale was made absolute on the 27th of August, since which time the purchaser had lain by.

Mr. Hickson, Q. C., for the plaintiff, now moved for a reference to the Master to inquire and report whether a good and sufficient title could be made to the purchaser under the decree in this cause.

Mr. Thomas Mullins, for the purchaser, said he was most anxious to complete his purchase, but resisted the application upon the ground that the plaintiff had been irregular in not furnishing, according to the long established usage in such cases, a fee for the opinion of counsel with the abstract of title; in consequence of which, the opinion had not been obtained, and the purchaser was, therefore, not in a situation to proceed upon the reference.

Mr. Hickson, in reply said, that the plaintiff was not bound to furnish a fee for the opinion of counsel with the abstract of title; and that in the present case the fund would be very deficient.

MASTER OF THE ROLLS.—It certainly has been usual for the plaintiff

In sales under decree, as in private sales, the plaintiff or vendor is not bound to furnish to the purchaser a fee for counsel with the abstract of title, unless by special condition. If the purchaser requires the opinion of counsel he must take it at his own expense, but he will have only a qualified or conditional property in the opinion until the sale is complete.

which previously required to be signed by the Six-Clerks, are now to be signed by the solicitors only; and the 20th General Order (October, 1836), which gives a schedule of the fees to be received by the Clerk of the Appearances, provides, *inter alia*, "for each charge, discharge, *consent*, and other document to which the signature of a Six-Clerk was required, and for which no other fee is provided in this schedule, 3s. 4d. (*i. e.* the Six-Clerk's fee under 4 G. 4, c. 61). The same order directs, that "No pleading, petition, charge, discharge, *consent*, or other document shall be received, or any act done by any Officer of the Court thereon, or any bill of costs be certified by the Master, without the production of the receipt of, or other evidence of the payment to, the Clerk of the Appearances and Writs, of all such of the before-mentioned fees as ought to be paid by the solicitor previous to the filing of any such pleading or document, or other act required to be done in any cause or matter." Consequently, every signature to a *consent*, which, under the old practice, should have been by a Six-Clerk, must now be accompanied by a stamp of the Clerk of the Appearances, and the *consent* cannot otherwise be made a rule of Court.

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to furnish with the abstract of title, a fee for the opinion of the purchaser's counsel upon it; but, I am now to consider, whether this is a practice founded upon sound principle; and whether the purchaser has a right to insist upon it, before he can be obliged to complete his purchase. I shall look into the authorities upon the subject.

Monday, December 2d.

MASTER OF THE ROLLS.

In this case the question is, whether upon a sale under a decree, the plaintiff, or party having the carriage of the decree, is bound, as of course, to furnish to the purchaser a fee for counsel with the abstract of title? There is no doubt that it has been the general practice for the plaintiff to do so; but,—is the practice such as ought to be enforced or continued?

The only reported decision, bearing directly upon the present question,* that I have been able to find, is *Leland v. Griffith* (a). In that case, the late Master of the Rolls held, that the purchaser under a decree is entitled to his costs of investigating the title, when there has been a substantial variance from the abstract furnished;† otherwise, when the title proves good, the purchaser must abide his own costs. By Lord Redesdale's order of June, 1805, lands cannot be set up for sale, under any decree or order of this Court, until there has been produced to the Master a full and true statement of the title, verified by affidavit, "together with counsel's opinion thereon, that under such decree or order, a good title (such as ought, in the opinion of such counsel, to be approved of by a Master, on a reference for that purpose) can be made to a purchaser of such lands, under such decree or order."‡ The costs of the abstract and opinion thus furnished must be borne by the estate; and if the rule is as contended for by the present purchaser, the consequence would be that, in every case, the estate should pay twice at least, and frequently five or six times over, for substantially the same thing. I cannot see how the purchaser is entitled to costs, when he gets, according to the contract of sale, all that he has contracted for. In the case of private sales, which, so far as the present question is concerned, do not differ from sales under decree, it is sometimes the practice for the vendor to furnish, with the abstract, a fee for the opinion of counsel upon it. That, however, is by express contract; and I cannot

(a) 2 Moll. 150.

* See his Honor's order in *Birch v. Alt*, ante, vol. 1, p. 230, by which the fee of ten guineas, furnished by the plaintiff for the purchaser's counsel, was disallowed.

† See *Fielder v. Higginson*, 3 Ves. & Bea. 142; — *v. Collinge*, *ibid*, 143, in n. *Wilson v. Clapham*, 1 Jac. & Walk. 36; *Mortimer v. Orchard*, 2 Ves. jun. 242. See, also, *Seoones v. Morell*, 1 Beav. 251.

‡ As to the Exchequer practice, see *Hutchinson v. Cathcart*, per RICHARDS, B. ante, vol. 1, p. 460.

find any decision, nor even a *dictum*, that, in the absence of such contract, the vendor is bound to do so. It is reasonable that the estate should bear the expense of making out title; but it would be most unreasonable that it should pay costs, because of the slow belief or apprehensions of the purchaser; and when I consider the nature and circumstances of the ordinary case of a sale under a decree—that it is a sale of a debtor's estate, ordered by the Court *in invitum*, and that the very heavy expenses of the Chancery proceedings, which it is impossible to think of without regret, are reducing the fund, and taking, perhaps, from a large class of creditors their only chance of payment, or eating up the residue, on the hope of which the debtor may be depending—I feel that it is the bounden duty of this Court to use every exertion to restrain those expenses, and that there is no case in which a purchaser should be held more strictly. I do not think that the possibility of the sale being frustrated by a defective title, affords an argument against the principle just stated; for if, upon investigation, the title fails, the purchaser will have a right to his reasonable expenses, and acquires only a qualified or conditional property in the abstract and opinions upon it, until the sale is complete. In Sir Edw. Sugden's treatise of *Vendors and Purchasers*, at p. 386 (8th ed.), it is stated (referring to the observations of Chief Justice Mansfield, in *Roberts v. Wyatt* (a), that “If the purchase goes off, not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose: and although the purchaser pays for the opinion, yet, for the same reason, that ought, it should seem, to be returned with the abstract.”

I do not at present mean to decide as to what may be the practice, when, upon investigation, the title fails;* but I cannot allow the purchaser's objection in this case, and shall make the common order of reference, as is desired.

(a) 2 Taunt. 270.

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* The following appears to be the result of the decisions upon the subject:—

1. The purchaser has no right to investigate the title before the sale has been absolutely confirmed; and, therefore, will not be allowed any costs of investigation incurred before that event: *Walsh v. Walsh*, 6 Law Rec. N. S. 129; *Digby v. Browne*, ante, vol. 1, p. 377.

2. If, by the negligence or want of due diligence of the party having the carriage of the decree, the purchaser cannot complete his purchase within a reasonable time, he will be entitled to his discharge, and to have his deposit with interest (at six per cent., according to *Kirwan v. Blake*, 1 Hog. 151; but, under the 204th Rule of Nov. 1834, five per cent.) and costs: *Pleasants v. Roberts*, 2 Moll. 507. In such case, it is probable that the costs should be borne by the negligent or dilatory party, and not by the estate or funds in the cause.

3. When the Master has reported that the title is bad, the purchaser will get back his deposit, &c., and be paid his costs out of the funds in the cause: *Reynolds v. Blake*, 2 Sim. & Stu. 117; but the report must have been confirmed: *M'Cann v. O'Farrell*, 1 Hog. 137; and if there be no funds in the cause, the plaintiff will be ordered to pay the purchaser's costs, without prejudice to the question how they shall be ultimately satisfied; *Smith v. Nelson*, 2 Sim. & Stu. 557.

4. Whether a purchaser, discharged in consequence of error in decree, shall have his costs—*quare*: See *Lechmere v. Brasier*, 2 Jac. & Walk. 232.

Saturday, November 30th.

**RECEIVER UNDER SHERIFFS' ACT—JUDGMENT ON
WARRANT OF ATTORNEY—BANKRUPTCY
OF RESPONDENT.**

**In the Matter of BAKER, Petitioner; and PETTIGRUE, Respondent;
and of the Act of 5 & 6 W. 4, c. 55.**

In 1834, P., being a trader, passed his bond and warrant, &c., to secure £450 to B., who entered judgment under the warrant as of the following Trinity Term. In 1839, B. having duly revived, &c. presented his petition under 5 & 6 W. 4, c. 55, for a receiver, and on the 24th of April, obtained the common rule *nisi*, which was made absolute on the 15th of May, when it was referred to the Master to approve of a proper person, &c. and on the 12th

In the year 1834, James Pettigru (the respondent), then and still being a trader, passed his bond for £450, with warrant of attorney, &c., to Thomas Baker (the petitioner), who entered judgment thereon in the Court of Queen's Bench, in or as of Trinity Term, in the same year.

In the course of this year (1839), Baker presented his petition in this matter, setting forth the judgment against the respondent, and praying a receiver over a competent part of his freehold estate.

On the 24th of April, the petitioner had a conditional order for a receiver, pursuant to the prayer of his petition.

On the 1st of May, the respondent was arrested for debt, and afterwards lay in prison, under the arrest, for upwards of twenty-one days.*

On the 15th of May, the conditional order in this matter was made absolute—in the common form, referring it to the Master to approve of a fit and proper person to be appointed receiver over, &c.; and further ordering that the said Master should state, in his report, the amount for which the said receiver and his sureties should enter into security, &c. &c.

On the 27th of May, a commission of bankruptcy issued against the respondent.

of June, the Master's report, approving of K. as a receiver, &c. was confirmed, and the tenants were ordered to pay him. Pending the proceedings, P., still being a trader, was arrested for debt on the 1st of May, and committed an act of bankruptcy on the 22d of May, by having lain in prison under the arrest for twenty-one days. On the 27th of May, a commission of bankruptcy issued against him, and on the 10th of June he was declared a bankrupt under the commission.

On motion of the assignee, for removal of the receiver and payment of the rents received, *Held*—1. That a judgment on warrant of attorney against a trader is to be considered as a judgment *by confession*, within the meaning of section 126 of 6 W. 4, c. 14 (the Bankrupt Act). 2. That a judgment creditor having an order for the appointment of a receiver under section 37 of 5 & 6 W. 4, c. 55, continues to be, notwithstanding such order, "a creditor having security for his debt," within the meaning of section 126 of 6 W. 4, until the rents have been paid over to him in satisfaction of his demand; and, therefore, that the appointment of the receiver in this case was overreached by the bankruptcy, and that the receiver should be removed.

Semble.—That the absolute order of the 15th of May, in this matter, was the order for appointment of a receiver, within the meaning of section 37 of 5 & 6 W. 4, c. 55.

* By the 21st section of 6 W. 4, c. 14, if any trader shall lie in prison twenty-one days under arrest or detainer for debt, he shall be thereby deemed to have committed an act of bankruptcy.

On the 31st of May, the Master made his report, under the order of the 15th, finding that B. D. Keene was a proper person to be receiver, and measuring the security to be given by him.

On the 10th of June, the respondent was declared a bankrupt under the commission, and James Cameron was appointed his assignee.

On the 12th of June, the Court made the common order, confirming the Master's report in this matter; and, accordingly, that the said B. D. Keene be receiver over the rents and profits of, &c., and enter into security by recognizance with two sufficient sureties, in the sum, &c., for, &c. &c.; the said recognizance to be duly enrolled; and, upon the enrolment thereof, it was further ordered, that the several tenants do pay all rents due and to grow due, &c.; and that the date of the enrolment of the receiver's recognizance be stated at the foot of the copy of this order, to be served upon the tenants.

There was now an application on behalf of James Cameron, the assignee of the bankrupt, that B. D. Keene, the receiver in this matter, should be removed, and pass his account for the rents and profits received by him, or which, without wilful default, he should have received, and that he be ordered to pay over to the said J. Cameron such sum as should appear to be in his hands on account of the said rents, &c.—It appeared that a mortgagee prior to the petitioner's judgment, who had filed a foreclosure bill in the Exchequer, consented to discontinue the equity cause, and to go in and prove his demand under the commission.

Mr. Edward Wright, for the assignee.—The questions in this case turn upon the construction of the 37th section of 5 & 6 W. 4, c. 55, and the 126th section of the late Bankrupt Act, 6 W. 4, c. 14.

According to the practice of this Court, upon petition of judgment creditors, under the 5 & 6 W. 4, there are several orders before the receiver is absolutely appointed; and the first question in this case is, which of these orders is "the order for the appointment of a receiver," mentioned in the 37th section? From the 31st and 33d sections,* it

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* 5 & 6 W. 4, c. 55, sec. 31. "And be it enacted, that from and after the commencement of this act, no grant in custodiam, &c.; and it shall be lawful for any person entitled to sue out, or who has already sued out a writ of *elegit* upon any judgment recovered in any of His Majesty's Courts at Dublin, or to issue, or who has issued execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery or the Court of Exchequer at the Equity side thereof, for an order that a receiver may be appointed of the rents and profits of the entire and not of a moiety only of the lands, tenements, or hereditaments which he would be entitled to have extended or appraised under a writ of *elegit*, or extended, seized or taken under a writ of *levari facias*, or other proceeding, on such recognizance, or to have a receiver thereof appointed by that Court extended to that matter; and it shall be lawful for the Court to appoint or extend a receiver accordingly over the whole thereof; or over so much thereof as shall appear to it sufficient for the purposes of paying the sum due on such judgment or recognizance; and every such petition shall state the judgment or recognizance, and the sum due thereon, and shall be verified by the affidavit of the person interested, or such other affidavit as the Court shall direct, stating the sum due for principal, interest, and costs, over and above all just and fair allowances; and it shall be lawful for the said Court to require proof by the affidavit of the party applying for such order, or by such other affidavit or affidavits or evidence as it shall require, of the particulars, and annual rental, or value of the lands over which such receiver shall be sought."

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would seem that the order contemplated by this act must be something in the nature of a final decree ascertaining the rights of the parties, and absolutely giving the relief sought; it must be the order by which the Court absolutely appoints a certain person to be receiver, and orders the tenants to pay their rents to him. If such be the due construction of this act, the receiver in this matter should be discharged without further question, and ordered to pay over to the assignee of the bankrupt the rents received, as the order by which B. D. Keene was appointed receiver in this matter, and the tenants were ordered to pay to him, was not made until the 12th of June—i. e. two days after the respondent had been declared a bankrupt under the commission.

But if the Court should decide that either the conditional order of the 24th of April, or the interlocutory order of the 15th of May, was an "order for the appointment of a receiver," within the meaning of the 37th section of the 5 & 6 W. 4, and that the petitioner was then to be considered as a creditor who had issued and executed an execution on his judgment, it would in that case be necessary to consider the concluding words of the section—"so as not to be affected by the bankruptcy of his debtor, *further or otherwise* than he would be if his debtor became bankrupt after execution executed;" and how far they are controlled or affected by the subsequent statute, 6 W. 4, c. 14 (the Bankrupt Act). By the 126th section of this latter act,* it is enacted,

Section 33d. "And be it enacted, that in every order made for the appointment of a receiver as aforesaid, the tenants shall be required to pay him all rents due, or which shall become due by them, for or in respect of the lands mentioned in such order; and every such order shall require the receiver to enter into security, by himself, and two sureties, to such amount as shall be therein specified, and such further security as the Court shall from time to time direct, for the due performance of his duties; and every such security shall be given by recognizance, and such recognizance may be acknowledged either before the Court or any Judge or Master thereof, or any Master extraordinary, or Commissioner authorised to take affidavits, or to take special bail therein, and shall be enrolled in such Court; and such order shall not be served on the tenants, nor shall such receiver receive any of the rents until such recognizance shall be enrolled; and the recognizance of the receiver and his sureties shall not be discharged or affected in consequence of such receivers being extended to any other matter."

Section 37.—"And be it enacted, that in determining the priority of the demands of creditors, the Court in which any question respecting such priority shall arise shall not give to the demand of any creditor priority over the demand of another, in consequence of his having obtained an inquisition on an outlawry or other proceeding taken by him, but shall determine such priority as if no such inquisition was had; and every creditor who shall obtain an order for the appointment of a receiver under the provisions of this act, shall be considered to be a creditor who has issued and executed an execution on his judgment or recognizance from the date of such order, and so as not to be affected by the bankruptcy of his debtor, *further or otherwise* than he would be if his debtor became bankrupt after execution executed."

* 6 W. 4, c. 14, s. 126—"Be it enacted, that no creditor having security for his debt, or having made any attachment in Dublin or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." See this statute in Mr. Darley's Collection, and the learned Editor's very useful notes.

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that no creditor, having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of any execution or extent served or levied by seizure before the bankruptcy; "provided that no creditor, though for valuable consideration, who shall sue out execution upon any judgment obtained by *default*, *confession*, or *nil dicit*, shall avail himself of such execution." The judgment in this case was on warrant of attorney, and, therefore, within the proviso: *Crossfield v. Stanley* (a). It may be admitted, that if the rents had been received and paid over to the petitioner before the bankruptcy, so that he ceased to be a creditor having security, the section just mentioned might not apply to him; but such is not the state of facts in this case, and *Lee v. Lopes* (b) is an authority to shew, that even if the rents had been levied, they could not be paid over to the petitioner after notice of the commission. The Receiver Act was prior* to the Bankrupt Act, and if they are inconsistent, the latter is the law;† therefore, the receiver should be removed.

Mr. *Litton*, Q. C., for a mortgagee subsequent to the petitioner's judgment, supported the motion.—[The MASTER OF THE ROLLS said, that the subsequent mortgagee, who was neither in, nor entitled to go into possession, had not a right to be heard on this motion, but that he would hear Mr. *Litton* as an *amicus curiæ*.]—He contended, briefly, that section 33 of 5 & 6 W. 4, c. 55, clearly shewed what the legislature intended in section 37 by "an order for the appointment of a receiver;" and, therefore, that an order for the appointment of a receiver, within the meaning of section 37, was not made in this matter until the 12th of June, after the respondent had been declared a bankrupt.

Sergeant *Greene* and Mr. *Armstrong*, for the petitioner.—The order of the 12th of June merely confirmed the Master's report, which was, as to matters of account and duties strictly ministerial, referred to the Officer to give effect to the absolute order for a receiver, pronounced by the Court on the 15th of May. Perhaps it might be contended that the title of the petitioner relates back to the time of filing the petition, as rents are to be considered as attached from the filing of the bill;‡ but it is sufficient for present purposes, that the absolute order of the 15th of May clearly appears to be the order intended by section 37 of the 5 & 6 W. 4, c. 55, and that from the date of that order the petitioner was to be considered as a creditor who had issued and executed an exe-

(a) 4 B. & Ad. 90.

(b) 15 East, 230.

* 5 & 6 W. 4, c. 55, received the royal assent on the 9th of September, 1835; and the 6 W. 4, c. 14, on the 20th of May, 1836.

† See *Rex v. Middlesex Justices*, 1 Dowl. P. C. 117; 2 B. & Adol. 818.

‡ See *Bland v. Gould*, ante, vol. 1, p. 5.

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cution upon his judgment, "so as not to be affected by the bankruptcy of his debtor further or otherwise than he would be if his debtor became bankrupt after execution executed." The only act of bankruptcy alleged to have been committed by the respondent was his lying in prison for twenty-one days under arrest for debt; and the title of the assignee did not accrue until the 22d of May, when the act was complete, and does not relate back to the time of the arrest: *Higgins v. M'Adam* (a), *Moser v. Newman* (b). Therefore, the bankruptcy of the respondent cannot affect the petitioner, unless it be decided that 6 W. 4, c. 14—without any express words shewing that the legislature so intended—divested a right,* and repealed section 37 of 5 & 6 W. 4, c. 55. Unless such a construction of 6 W. 4 be unavoidable, the Court should not adopt it.

We contend that section 126 of the Bankrupt Act does not apply to the present case, because the order for the appointment of a receiver in this matter was in the place and stead of an execution "served and levied by seizure" before the bankruptcy, and the proviso does not include judgments upon warrants of attorney.—[MASTER OF THE ROLLS. There was a similar proviso in the old Bankrupt Act, as to judgments by default, confession, or *nil dicit*; and, I think, you will find a case in which the objection now made was raised, and the Court decided against it.†]—Supposing the Court to decide against the objec-

(a) 3 Y. & Col. 1.

(b) 6 Bing. 556.

* The 11 & 12 G. 3, s. 4, c. 8, excepted securities by judgment obtained before the bankrupt became a trader liable to the bankrupt law; but the 6 W. 4, c. 14, has no such exception, and so far may be considered as having divested the rights of parties holding such securities. But now, by the 2 & 3 Vict. c. 86. s. 1, it is enacted, that nothing contained in the 6 W. 4, c. 14, "shall extend to any security or securities by judgment obtained before the 1st day of July. 1836. and before the bankrupt became a trader liable to become a bankrupt, but debts so secured shall have the same force and effect, priority and preference, as if the said last-mentioned act (6 W. 4, c. 14) had not been passed:" proviso as to lands sold or contracted to be sold in pursuance of any order of the Commissioners of Bankrupts, under the 6 W. 4, c. 14, before the passing of this act. However, it will be observed, that in the case above reported, the bankrupt was a trader at the time of passing the bond and warrant, and of the entry of the judgment; so that the petitioner did not come under the protection of the enactment just mentioned.

† 11 & 12 G. 3, c. 8, s. 3.—The reporter has sought without success for a report of the case adverted to by his Honor; but there are several reported cases which, as the reporter conceives, distinctly shew that the mode of construing such a clause is not uniform, but varies *prout res exigunt*. The proviso in 6 G. 4, c. 16, s. 108, Eng., corresponding exactly with the proviso in 6 W. 4, c. 14, s. 126, *fr.*, seems in England to be considered as of course including judgments on warrant of attorney. Several of the English cases above cited were cases of such judgments. In *Croufield v. Stanley*, 4 B. & Ad. 87, it was held that the proviso in 6 G. 4 includes judgments on warrant of attorney, but that 1 W. 4, c. 7, s. 7 (using nearly the same words), does not. Upon the English act of 8 & 9 W. 3, c. 11, s. 8, which enacts, that "If judgment shall be given for the plaintiff on a demurrer, or by confession or *nil dicit*, the plaintiff on the roll may suggest as many breaches," &c.—it has been held, that judgments on warrant of attorney are not included: *Austerbury v. Morgan*, 2 Taunt. 195; *Cox v. Rodbard*, 3 Taunt. 74; *Kinnersley v. Mussen*, 5 Taunt. 264. Upon the corresponding Irish act, 9 W. 3, c. 10, s. 8, there has been some diversity of opinion among the Judges:

tion just mentioned, still it is submitted this section cannot apply; for it applies only to creditors "having security" for their debt; and we contend, that before the bankruptcy, the petitioner ceased to be a "creditor having security." From the date of the absolute order for appointment of the receiver in this matter,* the petitioner was to be considered as if he had issued an *elegit* at law, and had gone into possession; therefore, from that time his judgment was satisfied: *Crawley v. Lidgeat* (a). As the 5 & 6 W. 4, c. 55, is peculiar to this country, it is not possible to cite any English decisions upon the precise point here raised; but the course of English decisions in analogous cases leaves little room for doubt, that the Judges in England would decide the question, if before them, in favor of the petitioner. *Wymer v. Kemble* (b); *In re Washbourn* (c); *Cole v. Davies* (d); *Morland v. Pellatt* (e); *Higgins v. M'Adam* (f).

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Mr. E. Wright mentioned that Mr. Warren, Q. C., was senior counsel for the assignee, but that he was at present speaking in the Court of Chancery.

The case was then ordered to stand for Mr. Warren.

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Judgment.

MASTER OF THE ROLLS.

I will not give Mr. Warren the trouble of speaking to this case, as I have been considering it, and have come to a conclusion in favor of his client.

This was an application on the part of James Cameron, assignee of James Pettigrue, a bankrupt, for removal of the receiver appointed in this matter, and that the said receiver should account for the rents which he has received, or without wilful default might have received, and pay over to the assignee the sum appearing to be in his hands — [His Honor here stated the facts, as already set forth.]—Upon this

* See *Hitchins v. Congreve*, 1 Mont. 225.

(a) Cro. Jac. 338. But see *Betty v. Betty*, 1 Alc. & Nap. 115.

(b) 6 B. & C. 479, 9 D. & R. 511.

(c) 2 M. & R. 374, 8 B. & C. 444.

(d) 1 Lord Raym. 724.

(e) 8 B. & C. 722, 2 M. & R. 411.

(f) 3 Y. & J. 1.

the words are—"If defendant shall not plead to the issue, but judgment shall be given against him upon demurrer, or by *nil dicit, non sum informatus, cognovit actionem*, "or the like," &c.:—the Court of Queen's Bench decided that this clause does not include judgments upon warrant of attorney; the Court of Exchequer, *contra. Gorman v. Hincks*, Batty, 527. In this last, which is the only Irish case bearing upon the point in the text that the reporter has been able to find, it appears that his Honor was counsel.

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case two questions have been raised :—First, whether an order for the appointment of a receiver, within the meaning of section 37 of 5 & 6 W. 4, c. 55, was pronounced in this matter before the bankruptcy of the respondent—i. e. before the 22d of May? Second—supposing that the order for appointment of the receiver was prior to the bankruptcy,—whether this, being the case of a judgment on warrant of attorney, is not within section 126 of the late Bankrupt Act, 6 W. 4, c. 14?

In consequence of the view which I have taken of this case—and as I think it will be most convenient that my judgment should proceed upon the broad and important ground to which the second question relates—it becomes unnecessary that I should absolutely decide which of the orders in this matter was the order for appointment of the receiver within the meaning of section 37 of 5 & 6 W. 4. However, my opinion is, that after the cause shewn against the appointment of a receiver has been disallowed, or the time for shewing cause has expired, the petitioner's title is complete, and that the absolute order then pronounced is the judicial determination in the matter, and may be likened to the award of an *elegit*, after which, all that remains to be done is strictly ministerial, to carry out the order of the Court. Accordingly, I would say that the order for appointment of a receiver under the provisions of the 5 & 6 W. 4, was in this matter the absolute order of the 15th of May, and prior to the bankruptcy of the respondent.

But the assignee insists, that even though the order appointing the receiver was prior to the bankruptcy, this case comes within section 126 of the Bankrupt Act; because, as he says, the petitioner is a creditor having security for his debt, and the judgment for satisfaction of which the receiver has been appointed is a judgment on warrant of attorney, which is a judgment by confession, within the meaning of the proviso in that section. I think a judgment on warrant of attorney must be so considered. Then, the remaining question is, whether, after the order for the appointment of a receiver, the petitioner continues to be a creditor having security for his debt? The counsel for the petitioner contend, that inasmuch as under section 37 of 5 & 6 W. 4, the order appointing the receiver is in the place and stead of execution executed, the case of the petitioner is analogous to that of a plaintiff in execution, after seizure and sale by the sheriff under a writ of *fiery facias*. I cannot see that there is much resemblance between these cases. The 5 & 6 W. 4 expressly provides, that a receiver already appointed may be extended, and that the rents afterwards received shall be paid according to priority;* and, by the 36th section, it is enacted, that so soon as the debt due on foot of any judgment shall have been paid off, it shall be lawful for the Court to direct satisfaction to be entered thereon, or that it shall be assigned as the Court shall direct.

* See sec. 38 : and *Harnett v. Harnett*, ante, p. 20.

The appointment of a receiver under this act, as I have already said, appears to me to be like the award of an *elegit* under which the creditor does not hold the land absolutely: it is an execution subject to the rights of prior creditors, who may at any time come in and suspend or supersede it; but it saves the original security until the debt is paid. On the other hand, by the seizure under a writ of *fiery facias*, the sheriff acquires a special property in the goods, leaving the general property still remaining in the defendant, and the plaintiff still a creditor having security. But the sale absolutely divests the defendant's property in the goods, and extinguishes the original debt. After that the defendant is no longer liable to the demand, and the plaintiff looks to the sheriff for the produce of the sale, as money had and received to his use. In *Wymer v. Kemble* (a), as Lord Tenterden observed, "The seizure and sale were perfect and complete before the act of bankruptcy;" and, therefore, it was held that the plaintiff in execution was not, at the time of the bankruptcy, "a creditor having security." *Morland v. Pellat* (b) was a similar case: there, also, the seizure and sale were complete before the bankruptcy. But in *Nolley v. Buck* (c), after the seizure, and before the sale—i. e. before the transfer of the property and the payment of the debt—the defendant committed an act of bankruptcy, and it was held that the assignees were entitled to recover, as, at the time of the bankruptcy, the bankrupt had not been absolutely divested of the property, and, therefore, the plaintiff in execution still continued to be "a creditor having security for his debt." Therefore, considering the principle of those decisions, and the provisions of the 5 & 6 W. 4, I have no doubt that a petitioner under that act, notwithstanding an order for the appointment of a receiver, continues to be a creditor having security, until the rents have been paid over to him in discharge of his demand; and, consequently, that the present case comes within the proviso in section 126 of the Bankrupt Act, and that the receiver must be removed.

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ORDER.—That B. D. Keene, the receiver in this matter, be removed, and pass his account, &c.; and that the Master do tax the costs of the petitioner Thomas Baker, incurred in procuring the appointment of the said receiver, and of appearing on this motion. And it is further ordered, that the said receiver do, out of the balance in his hands, after deducting the sum of £2 for the costs of vacating the recognizance of himself and his sureties, pay to the petitioner Thomas Baker the amount of such costs. And it is further ordered, that he do pay over the residue, if any, to James Cameron, the assignee.

(a) 6 B. & C. 479.

(b) 8 B. & C. 722.

(c) 8 B. & C. 160.

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nee of the said respondent under the commission of bankruptcy, which issued against him, to be accounted for by the said James Cameron in the matter of the said bankruptcy: and upon the said receiver so accounting and paying over such balance as shall appear to be in his hands, as before directed, and producing to the Clerk of the Recognizance the receipts of the said Thomas Baker and James Cameron for the balance in the hands, or of the said T. Baker, in case the sum due to him for such costs shall amount to or exceed the balance on said receiver's account, after deducting the said sum of £2; or in case no balance shall appear to be in his hands on the passing of the said account, it is further ordered, that a vacate be entered on the enrolment of the recognizance of the said receiver and his sureties.*

* The principle of the foregoing decision, viz., that notwithstanding the appointment of a receiver under the Judgment Act, the petitioner continues to be a creditor having security—is applicable as well to judgments in adverse suit, as to judgments by confession; and if the consequence of that principle should be followed out strictly, the bankruptcy of the respondent should, in every case in which it happened, determine the receivership, and entitle the assignee to all rents not actually paid over in satisfaction of the debt before the bankruptcy. However, the Master of the Rolls says, that the order for the appointment of a receiver under this act is like the award of an *elegit*; and the recent decision of the Court of Queen's Bench in *Betty v. Betty*, Alc. & Nap. 115, seems to place the tenant by *elegit*—or, according to the phrase of the present day, “the *elegit* creditor in possession”—in the very same situation as respects the bankruptcy of the defendant, as the present decision places the petitioner under the Judgment Act. It is therefore reasonable to presume, that although the petitioner having a receiver, and the plaintiff in possession by *elegit* continue to be, in certain respects, creditors having security, yet the appointment of the receiver just as the delivery under the *elegit*, passes an estate or interest—the “*chattel ut liberum tenementum*”—equivalent to the debt, defeasible by prior creditors only, but held absolutely as against the defendant and all other persons deriving under him; and, consequently, that except in the case of a judgment of the class included by the proviso in the 126th section of the 6 W. 4, c. 14, the possession by receiver under the Judgment Act, or by *elegit*, should not be disturbed, where the possession or the right to it has been obtained at any time before the bankruptcy was complete. Unless this construction be adopted, the provisions of the 5 & 6 W. 4, c. 55, as to judgment creditors, may be frustrated altogether, at least as to all judgments obtained since the 1st of July, 1836, where the conuzor is the respondent; for if the respondent be not already a trader, he may easily make himself liable to the bankrupt law, and, by an act of bankruptcy, utterly defeat the rights of prior creditors.

It is necessary to observe the several classes into which judgments have been divided by the bankrupt law:—

1. Judgments in adverse suit:—*i. e.* judgments after verdict, trial by record, or on demurrer. These are not included in the proviso in section 126 of 6 W. 4, c. 14, and as it must be presumed that the absolute order for the appointment of a receiver under 5 & 6 W. 4, c. 55, is in the place and stead of an execution “served and levied by seizure,” such order in respect of a judgment of this class will not be affected by the bankruptcy of the respondent, if pronounced before the act of bankruptcy is complete.

2. Judgments included in the proviso of section 126, 6 W. 4:—*i. e.* all judgments not within the description of the first class, excepting only the judgments excepted by 2 & 3 Vict. c. 86. But *quære*, whether a judgment by confession against the ancestor or other person under whom the respondent derived, would be included?—This class must be subdivided into—1. Judgments obtained *bona fide* by creditors for valuable consideration, which (according to *Godson v. Sanctuary*, 1 Nev. & Man. 52,) would appear to be protected by section 95, 6 W. 4, c. 14, corresponding with 46 G. 3, c. 135. If the decision just mentioned be correct, it seems to follow that an absolute order for a receiver under 5 & 6 W. 4, in respect of such a judgment, will not be affected by the bankruptcy of the respondent, if obtained without collusion, more than two calendar

Tuesday, December 4th.

TITHE RENT-CHARGE—HEAD-RENT—RECEIVER.

In the matter of SAUNDERSON, Petitioner, and STONEY, Respondent;
and of the Act of 1 & 2 Vict., c. 109.

THIS was a motion on behalf of the petitioner, that the receiver in this matter should, out of the rents received by him, pay over to the petitioner the sum due for rent-charge in lieu of tithe composition, up to and for the 1st of November, 1838, also the petitioner's taxed costs in this matter, including the costs of this motion, and that the receiver might be allowed credit for such payments on passing his accounts. The receiver was appointed in this matter under section 30* of 1 & 2 Vict.,

A receiver appointed under 1 & 2 Vict. c. 109, s. 30, to pay the tithe rent-charge, is bound to apply the sums received in the first instance in discharge of the rent-charge, and

costs, and has nothing to do with the payment of the head rent to which the land may be liable.

months before the commission issues. 2. The other subdivision of this class comprises judgments collusively obtained, as to which there does not appear to be any limitation against the title of the assignee.

3. Judgments excepted by 2 & 3 Vict. c. 86, *i. e.* judgments by confession, on warrant of attorney, &c., entered "before the 1st of July, 1836, and before the bankrupt was a trader." These judgments are in the same condition as if the 6 W. 4, c. 14, had never passed; and, therefore, they must be governed by the old Act of 11 & 12 G. 3, c. 8 (made perpetual by 36 G. 3, c. 34,) which, by section 4, expressly excepts such judgments from the proviso corresponding to that in section 126 of the late Act. Consequently, these judgments are to be considered as in the same predicament with judgments after verdict.

* 1 & 2 Vict. sec. 30.—"Provided always, and be it enacted, that in all cases where any lands charged with the said rent-charge shall be held or occupied by any person other than the person liable under the provisions of this Act to the payment thereof, it shall not be lawful to make any distress upon such lands, or upon any other lands, goods or chattels of such person, for such rent-charge, but in all such cases, and also in all cases where the person liable to the payment of such rent-charge may not be known to the party entitled to such rent-charge, and such rent-charge shall be in arrear and unpaid for the space of thirty-one days after the same shall have become due, it shall be lawful for the Court of Chancery or Exchequer in Ireland, upon application as hereinafter mentioned, and in default of its being shewn to such Court that the person in occupation of such land is liable to the payment of such rent-charge, to appoint a receiver, or to extend any receiver already appointed over the said lands to the matter of the said petition, to receive the rents or such part of the rents of the lands charged with such rent-charge as shall be sufficient to pay such rent-charge and all arrears thereof, until the whole of such arrears shall be discharged, together with such fees as shall be appointed by such Court for such receiver, and also the costs out of pocket of such application, and that out of the sums so received such fees and costs shall be ordered to be paid; and such order shall be made upon petition and affidavit, after reasonable time given to shew cause; and notice of the intention to make such application shall, ten days previous to making the same, be served upon the person, or the known attorney, agent or steward of the person in receipt of or entitled to such rents, either by delivering such notice to the party personally, or by leaving the same at his usual place of residence, or in case such person be not known, or there be any difficulty in effecting such service, then by serving such notice in such manner as the Court may, under the circumstances, think proper to direct; and that the said receiver shall be empowered by the said Court to recover the said rents, or so much thereof as may be necessary, by distress and all such other remedies as receivers in any manner appointed by Courts of Equity in Ireland are empowered to recover rents according to the rules and practice of such Courts respectively."

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c. 109, to receive the rents of certain lands in the petition mentioned, "for the purpose of paying to the petitioner the sum in the petition stated to be due to him for the rent-charge in lieu of tithe composition, up to the 1st of November, 1838, and one shilling in the pound on the monies to be collected by the said receiver as and for his fees, and and also the costs out of pocket of the petition, and the proceedings founded thereon." It now appeared that rents to the amount of £62 had been collected by the receiver, but that he refused to pay the petitioner the sums due for rent-charge and costs, without an order of the Court, upon the ground, that as receiver, he was bound to apply the sums received in the first instance in discharge of the head rent.

Mr. *Wm. Smith* submitted, that in this case the appointment of a receiver was merely in lieu of the remedy by distress—to receive the amount of the rent-charge and costs, and no more; that the 27th section* gives priority to the rent-charge over all other "charges," which must be understood as including the head rent. That although the rent-charge is payable by the person having the first estate of inheritance (within the meaning of the act), it is, nevertheless, a charge upon the lands; and that the proviso† in the 9th section would be unnecessary and insensible, if the tithe-charge was not a charge to which the head-rent itself was subject. In the 38th section of 4 *G. 4*, c. 99 (*Goulburn's Act*), analogous to section 27 of the present Act, the words are, "In preference to any other charge upon such lands, *whether for rent or for any taxes.*" If it should be held that the word "charge," in the 27th section of the present Act, does not include head-rent, cases may arise in which the rent-charger would be without remedy: if, for example, the lands be in occupation of a yearly tenant under a mesne landlord, at the same rent as the middle-man is liable to pay to the head landlord; there, the mesne landlord having no beneficial interest, may be in America, and if the head-rent is to be provided for in the first instance, the rent-charge would be irrecoverable.

Mr. *J. Shortt* appeared for the receiver, and requested the direction of the Court.

* Section 27.—"And be it enacted, that the said rent-charges shall have priority over all other charges, liens, mortgages and incumbrances whatsoever affecting the lands chargeable therewith, and shall and may be recovered by the ways and means hereinafter mentioned; (that is to say) by bill in equity, action of debt or on the case, or, if not exceeding twenty pounds, by civil bill in the Court of the Assistant Barrister or Chairman of the sessions of the county wherein the lands charged therewith may be situate, or by distress subject to the provisions hereinafter contained."

† "Provided always, that in case of the forfeiture, surrender, or other determination of any estate or interest, the owner whereof may be liable to the payment of such rent-charge as aforesaid, the party having the first estate of inheritance or other equivalent estate or interest as before described, in remainder or reversion, shall become liable to the said payment of such rent-charge: provided also, that in case of any such devolution of interest, no more than the amount of one year's arrear of rent-charge shall be a charge on the lands subject to the payment of such annual rent-charge."

The MASTER OF THE ROLLS said, he thought that in the present case the receiver had nothing to do with payment of the head-rent ; but his Honor directed the case to stand over, in order that notice of the present application might be served upon the respondent, who had not appeared.

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His HONOR now made the order as desired :—allowing the petitioner £5 for the costs of the motion ; and further, ordering that the receiver be removed, and pass his account, &c., and be at liberty to retain £2 for the costs of vacating his recognizance, and pay over to the respondent the balance, if any, appearing to be in his hands ; and upon production to the Clerk of the recognizances of the respondent's receipt, verified by affidavit, that the recognizance be vacated.

Mr. *Shortt*, for the receiver, asked for his costs of appearing on this motion ; but

The MASTER OF THE ROLLS would not allow them, as, he said, the receiver should not have raised the question, and had no right to appear.

Thursday, December 6th.

PRACTICE—INVESTING RECEIVER'S BALANCE.

In re COOPER, Petitioner, v. COOPER, Respondent.

MR. CHAMBERS WALKER, for the receiver, moved that £1202. 1s. 8d., now in bank to the credit of this matter, being the balance on foot of the receiver's last account, might be invested in stock, &c., and for the costs of this motion.

MASTER OF THE ROLLS.

This is not a proper motion for the receiver, and I will not make any order upon it. Under the New Rule, the petitioner may have had this balance invested as of course, if he should think proper to make a special application for the purpose. I will not allow him any costs of the motion, unless he can give me a satisfactory explanation for not having had the money invested under the Rule.

A receiver should not move that his balance may be invested, as such is not properly his motion.

As the plaintiff may have the balance invested by direction of the Master, when passing the receiver's account, under the 11th General Order of Feb. 1839, without apply-

ing to the Court, the costs of the motion will not be allowed, unless the applicant shews satisfactorily why he had not the money invested under the Rule.

* See No. 11 of the New and Amended General Orders (of February, 1839), *ante*, vol. 1, p. 221.

Saturday, December 7th.

PRACTICE—DISMISSING BILL FOR WANT OF PROSECUTION.

HARDWICKE v. WARREN and others.

Where a plaintiff resident abroad did not, within a reasonable time, comply with an order upon him to give security for costs, the Court ordered him to give security before a certain day, and in default, that his bill should stand dismissed without costs.

On the 8th of June last, the Court ordered that the plaintiff, who was resident out of the jurisdiction, should give security for costs, and that his proceedings be stayed in the mean time. No security was since given.

Mr. *Stearne Miller*, for the defendant Susanna Warren, now moved that the order of the 8th of June be discharged, and that the plaintiff's bill be dismissed, with costs, for want of prosecution. *Camac v. Grant (a)*; *Fyan v. Mahon (b)*.

Mr. *Webber*, for the plaintiff, said this was an executor's bill, and that an executor should not be made liable for costs, except in the case of gross laches. In *Furnell v. M'Mahon (c)*, Sir Anthony Hart doubted the propriety of the order which he was reported to have made in *Camac v. Grant*.

MASTER OF THE ROLLS.

I was counsel in several cases of this kind before Sir A. Hart, and I remember, that after the doubts respecting the order in *Camac v. Grant* had been expressed, it appeared, upon an inquiry in the Register's Office in England, that the order, as reported in that case, never was drawn up, nor entered in the Register's Book. I will consider the present application.

Monday, December 9th.

The MASTER OF THE ROLLS, after adverting to the foregoing application, now said:—

The form of this application should have been,—that pursuant to the order of the 8th of June, the plaintiff may give security for costs on or before a certain day; or in default, that his bill may be dismissed.—The only question is, whether, in such case, the bill should be dismissed with or without costs?

The practice as to dismissing a bill, where the plaintiff, resident abroad, does not comply with an order upon him to give security

(a) 1 Sim. 348.

(b) 3 Law Rec. O. S. 364.

(c) 3 Law Rec. O. S. 258.

within a reasonable time, appears to have been first introduced by Sir A. Hart in *Camac v. Grant*; but I apprehend there was not any order actually made in that case, as there was no entry of it in the Register's Book. In *Furnell v. M'Mahon*, Sir A. Hart said, that in *Camac v. Grant*, the order he proposed to make was, to dismiss the bill *without costs*: and in *Fyan v. Mahon*, he said, that after much consideration, he thought the decision in *Camac v. Grant*—by which I understand an order, that in default the bill should be dismissed without costs—was right. In *Martin v. Farrell* (a), where the question was, whether, under the old practice, a defendant could regularly enter a side-bar rule to dismiss the bill for want of prosecution, while the plaintiff's proceedings were stayed under an order to give security, the late Master of the Rolls, after stating that the side-bar rule had been entered irregularly, *suggested*, that if the defendant had made a special motion grounded upon the former order, he would have ordered the plaintiff to give security on or before a certain day, or in default, that his bill should stand dismissed with costs; but I have not been able to find any case in which such an order was actually made by him. In *Cliffe v. Wilkinson* (b), the plaintiff having been ordered to give security, offered insolvent persons as sureties, and the defendant moved that the plaintiff should give security within ten days, or in default, that his bill be dismissed with costs. Sir L. Shadwell granted the application; but before the ten days expired, the plaintiff moved for liberty to bring in £100, instead of giving security by recognizance; and counsel having observed that Sir A. Hart was dissatisfied with the order as reported in *Camac v. Grant*, the order then pronounced, substituting the bringing in of a sum of money instead of giving security by recognizance, was in the alternative, that in default the bill should be dismissed.

I must own that I was disposed to order, that in default the bill should be dismissed with costs; but as I do not find any satisfactory authority for such an order, and as Sir A. Hart, who first introduced the practice, said *without costs*, I shall now say the same.

ORDER.—Let the plaintiff give security for costs on or before the first day of next Term, as to the said defendant Susanna Warren, and accordingly refer it to the Master to measure the amount, and to approve of such security; and in default thereof, let the bill stand dismissed, without costs.*

Mr. W. Smith, *amicus curiæ*, mentioned the case of *Powell v. Smith*, in which the late Master of the Rolls ordered, that in default the bill

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(a) 2 Hog. 151.

(b) 4 Sim. 124.

* See next case.

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should stand dismissed *with costs*. The case was not reported, but Mr. *Smith* afterwards obtained and furnished to the Court a copy of the order.*

* 1st December, 1828.—*Powell v. Smith*.—In 1825, the Court ordered that the plaintiff, who was resident out of the jurisdiction, should give security for costs, and in the mean time that his proceedings be stayed. No security was given. On the 1st of December, 1828, Mr. Creighton, for the defendant, moved that the plaintiff give security within ten days, &c. Order:—That plaintiff give security, on or before the first day of next Term; or in default, that his bill be dismissed with costs, and refer it to the Master to tax same, without further order.

Monday, February 3d, 1840.

PRACTICE—DISMISSING BILL.

KNIGHT v. WILSON and others.

Plaintiff resident abroad ordered to give security pursuant to former order, on or before the first day of next Term, or in default, that his bill should be dismissed with costs.

ON the 11th of January, 1838, Lord De Blaquier, one of the defendants in this cause, obtained an order that the proceedings in this cause be stayed 'until the plaintiff, resident out of the jurisdiction, should give security for costs, and it was accordingly referred to the Master to measure the security as to the said defendant; and by a further order of the 11th of April, 1839, the Master was directed to measure the security as to all the defendants. No security being given,†

Mr. *Stearns Miller*, for the defendant Thomas Wilson, now moved on notice of the 30th of January, 1840, that the plaintiffs give security for costs, in pursuance of the order of the 11th of January, 1838, and 11th of April, 1839, on or before the first day of next Term, or, &c.

ORDER:—It appearing by said notice of 30th of January, 1840, that same was served upon Messrs. M'Causland and Fetherston, solicitors for the said defendant who obtained said orders; Let the plaintiffs give security for costs by recognizance, &c., as to the said defendant Thomas Wilson, on or before the first day of next Term, in such sum as the Master shall measure; or in default thereof, let the bill stand dismissed with costs as to the said defendant Thomas Wilson, including the costs of this motion.

† See the former application in this cause, *ante*, vol. 1, p. 375.

Thursday, December, 5th.

LETTING UNDER THE COURT—BIDDING OVER VALUE.

COOTE v. COOTE.

MR. KELLER, on behalf of Roger O'Callaghan, moved that he be discharged from his bidding, the same having been under misapprehension and by mistake; or that upon his undertaking to become the tenant and to take out a lease at such rent as upon inquiry the Master should deem reasonable, and to enter into the usual recognizance, it might be referred to the Master to inquire and report what would be a reasonable rent for the premises, which consisted of a mansion-house and demesne.

Mr. O'Callaghan made an affidavit, stating, that being unable personally to attend the letting in the Master's office, he wrote to W. Murphy, his agent in Dublin, to attend on his behalf, and bid one pound over any other bidder; but that he never contemplated the rent exceeding £150 per annum, which he believed to be full the value of the premises, and that he did not intend to have bid beyond that sum.

At the letting only three bidders appeared. The first stopped at £110. The bidding was then continued between a person named Burton (who, as it was alleged, was a common farmer without capital) and the agent of O'Callaghan, until Burton bid £260, whereupon O'Callaghan's agent bid £261, and was declared the tenant. The agent made an affidavit, stating, that at the time of the bidding he was totally ignorant of the extent or value of the premises, and, therefore, following his instructions literally, he would have continued to bid as long as any person bid against him.

Mr. S. Miller for the receiver, resisted the application.

MASTER OF THE ROLLS. I must hold this gentleman to his bidding. For aught that I know, Mr. Burton would have been a solvent tenant at £260; and £261 may not be too much for a desirable residence. At any rate if Mr. O'Callaghan has bid more than a fair rent he must blame himself; the estate is not to suffer by the looseness of his instructions to his agent. There was an application similar to the present in *Cox v. Cox*, where a near relative of the inheritor bid, under some misapprehension, as it was alleged, considerably beyond the value, and then came to the Court to be discharged; but all that I could do for him was to order that the premises should be set up again, upon his undertaking to pay all the costs occasioned by the re-letting, and to give security by recognizance for the regular payment during the term, of a certain annual sum by way of compensation for whatever might be the difference between the rent offered by him, and the rent to be

Upon a letting under the Court, the person declared highest bidder will not be discharged from his bidding, though it was at a great over-value, and was by an agent who appeared to have misapprehended the intention of his instructions. However the lands may be set up again upon the bidder's undertaking to pay all costs occasioned by a re-letting, and to enter into security by recognizance for payment yearly, during the term, of a sum to be settled by the Master, by way of compensation for the loss by any difference between the rent already bid, and the rent to be obtained upon the re-letting.

Where the bidding was £261 per annum, and was excessive, the Court ordered, upon consent, that the bidder be deemed tenant at £200, and that he should take out leases at that rent, &c.

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obtained upon the re-letting.* I could not do more in the present case, unless Mr. O'Callaghan can procure an affidavit from Burton, admitting that his bidding was not *bona fide*,—or can otherwise show me satisfactorily, that he attended as a mere puffer, and for the purpose of harassing persons really anxious to become the tenant.

Mr. *Keller* prayed that the case might stand over for a week, to give O'Callaghan the opportunity of making further inquiries, and of seeking such further affidavit as was suggested by the Court.

His HONOR desired that the case should stand over accordingly.

Friday, December 12th.

Mr. *Keller* now mentioned this matter again, and stated that it was impossible to procure the required affidavit from Burton, who, of course, would not voluntarily make himself liable to an attachment; but the solicitor for the receiver and for the minor plaintiffs attended, and stated to the Court, that £200 would be a sufficient rent, and that it would be for the interest of all parties in the cause that Mr. O'Callaghan should be declared the tenant at that rent.

The MASTER OF THE ROLLS then made the following order, O'Callaghan consenting :—

Upon reading the affidavit of Roger O'Callaghan, filed, &c., and of W. Miller, filed, &c., and it being stated to the Court by Mr. Leonard Dobbin, solicitor for the minor plaintiffs and for the receiver, that he is informed by the said receiver that the sum of £200 per annum is a reasonable sum to be charged for rent of said lands :—Let the said Roger O'Callaghan be deemed as tenant at said rent of £200 per annum ; and let him take out leases, and enter into security by recognizance, according to the course of the Court : and let him pay to the said Leonard Dobbin, as solicitor for the minor plaintiffs and the receiver, the sum of £7 for his costs of appearing on this motion.

* *Cox v. Cox*.—On the 10th of May, 1838, the house and demesne of Clara were let to Ambrose Cox (brother of the principal defendant), for seven years pending the cause, at £413 per annum, *i. e.* £3. 10s. an acre. On the 6th of June, it was ordered, upon the motion of the said A. Cox, that the lands should be set up again, without prejudice to the question as to compensation. On the 16th June, the lands were set up again, and let to R. O'Brien, at £306. 16s.—*i. e.* £2. 12s. 6d. per acre : loss upon the re-letting, £106. 4s. a-year. 23d of June, 1838, on motion of the receiver, the Court declared that the said A. Cox was bound to make compensation for not taking out leases pursuant to his bidding, and referred it to the Master to measure the amount of such compensation. On 1st May, 1839, the Master reported that the said A. Cox should pay £35 per annum during the term, by way of compensation; and on the 11th of May, it was ordered, "That the said A. Cox, he so undertaking, do, within three weeks from the date of this order, enter into recognizance in the sum of £150, conditioned for the payment of the yearly sum of £35 to the said receiver, in half-yearly gales, on every 1st day of November and 1st of May in each year, for seven years pending this cause, from the 1st day of May, 1838. And it is further ordered, that the said A. Cox do pay to the receiver the costs of the said orders, bearing date respectively the 6th and 23d days of June, 1838, and the reference thereby directed. And it is further ordered, that the receiver be at liberty to charge his costs of this motion, as receiver's costs in the cause."

CHANCERY.

Tuesday, November 12th.

DEVISE—CONSTRUCTION.

MONTGOMERY v. MONTGOMERY.

THE original bill in this cause was filed on behalf of the three younger children of John Montgomery, deceased, minors, by their next friend, against their brother, also a minor, the heir-at-law of the deceased, and against his personal representative, for the purpose of having the will and codicils of the said John Montgomery established, and the trusts thereof carried into execution under the direction of the Court, and of having an account taken of his real and personal estate, and the rights of the several minors therein declared and ascertained. On the 4th of June, 1835, a decretal order was pronounced, by which the will and codicils of the testator were declared to be well proved, and that the trusts thereof should be performed and carried into execution, and the usual accounts of his real and personal estate were directed.

In pursuance of that decree, the Master made his report, by which he found that the testator was seized of several descendible freehold properties, and of considerable personal estate.

After the Master had made his report, one of the minor plaintiffs died, intestate and unmarried, leaving the minor defendant her elder brother and heir-at-law; and, in consequence of her decease, a supplemental bill was filed on behalf of the surviving minor plaintiffs, against their brother the heir-at-law, and against the personal representative of the deceased minor, for the purpose of having the opinion of the Court on the question, whether on the decease of the minor, her share in the real and personal estate of the testator went over by survivorship to the other minors, her brother and sisters, or was absolutely vested in her, and devolved, on her decease, to her heir-at-law and personal representative respectively? The will and codicils of the testator, on which this question arose, were as follow:

"In the name of God, Amen.—I, John Montgomery, of Ballynafeigh, being of sound mind, do hereby ordain and publish this my last will and testament. First—To my wife, Matilda Montgomery, I will and bequeath the sum of £60 per annum. Secondly—To my children I bequeath all my property, freehold and chattel, share and share alike, an agent to be appointed by my executor to collect the rents. Thirdly, To my mother, Catherine Montgomery, I leave the sum of £40

Devise to "children, share and share alike." 1st codicil appointed guardian "during minority." 2d codicil, "In the event of the death of any of the children, their portion to be divided among the survivors, share and share alike." *Held*, that "In the event of the death," meant death during minority."

In a will, the words, "in the event of the death" of the devisee, are never construed to mean the event of a lapse, unless the will can bear no other construction.

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"per annum during her life. And I appoint James Stewart, Esq., of Ballynafeigh, and George Withers, of Rosemary-street, Belfast, executors to this my last will and testament.—Ballynafeigh, Feb. 8, 1834.

"JOHN MONTGOMERY.

"Witness present—WM. QUIN, GEO. M'CLURE, ROBERT LITTLE."

CODICIL, No. 1.—"And I hereby nominate and appoint the aforesaid executors, James Stewart, Esq., and George Withers, together with my wife, and William Boyd, Esq., of Fortbreda, guardians of my children *during their minority*."

CODICIL, No. 2.—"*And in the event of the death of any of the children, I do hereby direct that their portion of the property be divided share and share alike among the survivors.*"

JOHN MONTGOMERY.

Feb. 9, 1834.

"Witness present—WM. QUIN, GEO. M'CLURE, ROBERT LITTLE."

The cause now came on to be heard on pleadings and proofs.

Mr. *M'Donnell*, Q. C., for the plaintiffs.—Under the true construction of the will and codicils, all the surviving minors are entitled equally to the share of their deceased sister in the real and personal estate of the testator. The words in the second codicil, on which the question arises, may receive three possible constructions: first, in the event of any of the children dying *before the testator*; secondly, in the event of death *during minority*; and thirdly, in the event of *death, whenever it might happen*. If the third construction were adopted, the plaintiffs would be entitled; but it is not necessary to contend for that construction, as it would have the effect of reducing the interests of the children to estates for life, and conferring the whole property on the survivor, which cannot be supposed to be the intention of the testator.

It will be contended for the defendants that the first construction ought to prevail, and that the gift depending on a contingent event must be taken to refer to the time of the death of the testator, so as to provide against a lapse, and that the deceased minor, having survived the testator, become absolutely entitled. It is, however, a general rule of construction applicable to wills, that a testator is presumed to calculate on his will taking effect, rather than the contrary, and not to contemplate a lapse by the death of any devisee before himself, if it will admit of another construction. It is true that such construction has been adopted in several cases, where there was no other event to which the terms of contingency could be referred, except the death of the testator; but it has been only adopted from necessity, and, generally speaking, is an unnatural construction. Wherever, therefore, there is another period subsequent to the decease of the testator, to which the death may be referred, the words will be considered as providing for that

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event.* The principle of construction applicable to such cases is stated by Sir W. Grant in *Cambridge v. Rous* (a). According to the defendants' construction, the words "before me" must be introduced, and the clause must be read thus, "In the event of the death of any of the children *before me*." Besides, the testator had already provided against a lapse, by giving all his property by the will to his children as a class, so that if any died in his lifetime, the survivors would take the entire (b). And it makes no difference, that the gift is to the children as tenants in common (c). It is obvious here, however, from the context of the will, and what are called the two codicils (though they are really one, having only one execution and attestation, and being connected in sense by the conjunction *and*,) that death during minority was the event which the testator was contemplating throughout. It appears by evidence in the cause, that he was on the point of death when he made the codicils, having afterwards died on the same day, and that his children were then of very tender years. He directs an agent to be appointed to collect the rents, viz., during their minority, and by the codicil, and immediately preceding this gift over, he appoints the executors guardians of his children during their minority. During that period, therefore, they were not to have the absolute enjoyment of the property. The language too in which the devise over is expressed, imports that the testator was only looking to that period: the word "*children*" conveys to the mind the idea of minority, and the direction that the "*portion*" of any child dying should be divided among the survivors, implies a prospective event, when the share should be ascertained. *Home v. Pillans* (d) is an authority to shew, that the words under twenty-one years may be supplied to effectuate the intention. It is no objection to this construction, that if any child married and died under twenty-one, leaving issue, that such issue would not take, as such may be the consequence, whenever the estates do not vest in children until they attain twenty-one, whether limited by settlement or will.

Mr. Nelson and Mr. Allen for the defendant.—The words here are "In the event of the death of any of the children." In the well known case of *Trotter v. Williams* (e), the words were "If any to whom I have given any money-legacy happen to die." The cases are, therefore, precisely similar, and the testator must be taken to mean the event of a lapse. There are greater difficulties in adopting the construction

(a) 8 Ves. 21.

(b) *Finer v. Francis*, 2 Cox 190, S. C. 2, B. C. C. 658. 2 Pow. Dev. by Jarman, 327.(c) *Doe d. Stewart v. Sheffield*, 13 East, 526.

(d) 2 Myl. & K.

(e) Prec. Ch. 78.

* 2 Pow. Dev. by Jarman, 763.

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contended for by the plaintiffs than in following *Trotter v. Williams*, for, if the words are taken to mean the event of death *during minority*, it would follow, that if one of the children marries and dies under age, leaving issue, such issue will be excluded by the construction sought to be given to this will.

Mr. *Ferguson* replied.

LORD CHANCELLOR.

My present view is, that the surviving children will take under the codicil. I must choose between the three constructions which have been adverted to. The second construction cannot prevail, namely, that in the event of the death of any of the children *at any period*, his share was to go to the survivors. To adopt this construction would be reducing the interest of every devisee to an estate for life, and such a construction is not to be sustained. The third construction is, that the words must be taken to mean "in the event of the death of the legatee before the testator himself." That is a construction which is never adopted but from necessity; there are cases where from the impossibility of finding any other construction, the Courts have been obliged to suppose that the testator meant the event of the devisee dying before himself; here there is no necessity for resorting to such a construction. The case is put by Mr. *Nelson*, that one of the devisees might marry and die during minority, leaving issue; then, according to the construction contended for by Mr. *McDonnell*, such issue could not take. It is suggested in answer to this, that a similar consequence will follow in every case where a will or a settlement is so drawn that the estates do not vest in children until they attain twenty one. But I do not see that the testator was looking to such an event: he appoints a guardian during their minority. If the question had been put to him, or if it had occurred to him, that one of them might marry during minority, for aught that I know, the testator might have said "I do not mean that you should marry during minority." My present impression, therefore is, that the words "In the event of the death" must be taken in this will to mean, in the event of the death during minority, and, consequently, that the surviving children are entitled to the share of the one who has died. I shall, however, consider it further, and if I see reason to alter my opinion I shall mention the case again.

The decree was drawn up accordingly, and the case was not mentioned again.

Tuesday, 26th November.

**EXECUTOR—LIABILITY OF DEFAULT OF CO-EXECUTOR
—PLEADING—PARTIES.**

SCULLY v. DELANY.

THIS was a bill filed by the trustees and parties claiming under the marriage settlement of Francis O’Ryan and Eleanor his wife, against the surviving executor of Edward Scully, for the purpose of charging him with the amount of two bonds, which had been lost by the default of the deceased executor. The principal questions discussed at the hearing were, *first*, whether an executor merely taking probate and not acting, is liable for acts of default by his co-executor who acts? *Secondly*, whether a right to make a party accountable for sums lost by wilful default, could be transferred or assigned by the operation of a certain deed of marriage settlement mentioned in the cause? *Thirdly*, whether the devisee of one moiety of the residue under Edmond Scully’s will, could maintain this suit against the defendants, without making the devisee of the other moiety a party?

An executor who joins in taking out probate, but does not act, is liable for the acts of his co-executor, and chargeable for monies lost by the wilful default of such co-executor.

The material facts in the cause were as follows:

Edmond Scully, by his will, dated in 1806, after bequeathing several legacies, devised the residue of his real and personal estate, one moiety to his grandson Francis O’Ryan, for life, with remainder to his first and other sons in strict settlement. The other moiety to Edmond O’Ryan, his other grandson, under like limitations; and in case his personal property should not be sufficient to pay his debts and legacies, the same to be a charge on his real estates; and he appointed Andrew O’Ryan, Matthew Moore, and the defendant William Delany, his executors.

The testator died in 1806, shortly after making his will, and his said executors took out probate thereof.

The personal estate of the testator was considerable, and partly consisted of two joint and several bonds of Bernard and Dennis Delany, dated 29th March, 1803, in the penal sum of £998 each.

Bernard Delany was the father of William Delany, executor in the will, and Dennis Delany was his brother.

Although warrants of attorney were annexed to the above mentioned bonds of 1803, no judgments were entered thereon until the year 1818, and during this long interval, some time in the year 1817, an assignment of certain freehold and chattel property was executed by the said Bernard Delany, one of the obligors in the bonds, to the defendant William Delany, who thereupon entered into possession of the property so assigned.

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It also appeared that Bernard and Dennis Delany were entitled to other real and personal property, part of which was mortgaged by them in the year 1817. In 1818 judgment was entered on the bonds of 1803.

Andrew O'Ryan appeared to have been the sole acting executor. He died in the year 1822. His co-executor Moore died in 1825, leaving defendant William Delany sole surviving executor, who then took on himself the management of the assets of the testator.

By deed of marriage settlement in 1822, Francis O'Ryan, sen. assigned his moiety of the residue, to which he was entitled under the will, to plaintiffs, on certain trusts for the uses of the marriage, under which limitations the plaintiffs Francis O'Ryan, jun. and his brother and sisters claimed as *cestui que trusts*. The bill was filed by the trustees and *cestui que trusts*, under that settlement, charging that the obligors in the bonds had become insolvent, and that by reason of judgment not having been entered thereon until 1818, such judgments were now unavailable; and praying that the deed of 1817 might be set aside and declared fraudulent and void, and that an account should be taken on foot of the two bonds of 1803, and that the plaintiffs should be decreed entitled to be paid the amount by William Delany, or such of his co-defendants as should be found chargeable therewith.

The defendants were William Delany (as surviving executor, also as personal representative of Bernard Delany), Dennis Delany, and John Chaytor, personal representative of Andrew O'Ryan, the original acting executor, and Moore, the personal representative of Moore the third executor. The defence relied on by the answer of William Delany was, that Andrew O'Ryan had been the sole acting executor of Edward Scully, and as such had possession of the bonds and warrants of 1803, and that he the defendant had been guilty of no default. It, however, appeared from his answer, that he was an attesting witness to the execution of the said bonds, and aware of their existence at the time of the testator's death, and he admitted that if diligence had been used by Andrew O'Ryan, the acting executor, in entering judgment thereon, the amount would have been recovered; but that no diligence on his own part could have altered the result. He also admitted that Bernard and Dennis Delany were seized or possessed of considerable real and personal property, until shortly before the time when judgment was entered.

Mr. Warren, Q. C., Mr. W. Brooke, Q. C., Mr. O'Brien, and Mr. Loughnan, for the plaintiffs, submitted—

First, that William Delany having taken out probate of the will, was bound to perform the duties of executor, and was answerable for the neglect to enter judgment on the bonds, although he, in fact, permitted

his co-executor to manage the estate. *Powell v. Evans* (a); *Booth v. Booth* (b); *Mucklow v. Fuller* (c). Nov. 1839.

Secondly, that the present case went beyond any of those cited, inasmuch as William Delany had actually received a portion of the property, which would have been liable to the judgments if they had been entered in time, and that he was aware that Bernard and Dennis Delany were declining in their circumstances, and incumbering the property which should have been made available to satisfy the plaintiffs' demand.

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Mr. *Pennefather*, Q. C., Mr. *Blackburne*, Q. C., and Mr. *Sherlock*, for the defendant William Delany—

First, if there was any ground of action or suit here, it is in Francis O'Ryan, sen., and it is now alleged that he assigned that right of action to the trustees of his marriage settlement, which would be champerty. Francis O'Ryan makes no complaint.

Secondly, the claim here is barred by the statute of limitations. Even in 1822 the claim was barred by the statute, and could not be revived by the deed then executed.

Thirdly, here it was impossible for William Delany to enter judgment on the bonds not in his possession. How can he be charged as for wilful default?

Fourthly, the suit is defective, E. O'Ryan's eldest son should be before the Court, E. O'Ryan being devisee of the other moiety of the residue.

Mr. *W. Brooke*, Q. C., in reply.—There are legacies unpaid, and the minor has a right to have the produce of the bonds applied to pay those legacies in order to clear the real estate, which by the will is charged with debts and legacies, in case of deficiency of personal estate. Therefore, the statute is out of the case. The minor claims the real estate under the will and not under the deed of 1822, and, therefore, there can be no champerty, *Williams v. Protheroe* (d). The statute of limitations cannot apply as to a minor. The release by Francis O'Ryan sen. could not affect the rights of the minor as tenant in tail.

LORD CHANCELLOR.

The only question is, whether an account is to be directed of the sums received, or which might without wilful default, have been received? It is contended that the plaintiffs here cannot be better off than Francis O'Ryan. But their title to the real estate is not under the deed of 1822;

(a) 5 Ves. 838.

(b) 1 Bevan, 125.

(c) Jac. 198.

(d) 3 Young & Jer. 129.

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DELANY.

the title of Francis O'Ryan was as devisee for life of the real estate; the minor take under the will, and, therefore, it was not competent to him to waive that account, to the injury of the persons entitled under the will. I think there is no resemblance here to a case of champerty. As to the acquiescence of the parties, when a person is clothed with the character of trustee, the *cestui que* trusts shall not be affected by his acts, except so far as they knew and acquiesced.

Then, as to the question whether the party here is to be charged as for wilful default? The Court, before it does that, must have some ground laid on which the Officer is to be directed. I think there is ground here to inquire whether he has been guilty of wilful default. William Delany is to be considered answerable as executor for all the duties which an executor is bound to perform; the authorities cited go to shew that merely taking probate of the will makes him liable. But here he is not only executor, but he is fixed with the knowledge of the default of his co-executors, and he is liable. Francis O'Ryan, sen., has done several acts which disentitle him to such an account, but some of the debts and legacies have not been paid, and the plaintiffs are entitled to apply the produce of the bonds in case of the real estate for the benefit of the minor, F. O'Ryan, jun. F. O'Ryan, jun.'s, title is not under the deed of 1822, but under the will of Edward Scally.

Some of the facts alleged by the defendant have not been proved. As to what passed between F. O'Ryan, sen. and his father is not proved. The account alleged has not been proved. Then it is said that this is an adventurous suit, but it appears to me very properly brought before the Court. It is a bill filed after a reference whether it would be for the benefit of the minor; it was very fully considered by Master Townsend; and the Master of the Rolls, on full consideration, confirmed his report. I consider the bill a proper one to be filed. I shall direct an inquiry whether William Delany has been guilty of wilful default. The devisee of the other moiety of the real estate is not before the Court, which I think is an objection to the bill. I direct an account, but the Master is not to proceed until the devisee of the other moiety is brought before the Court by supplemental bill.

Monday, December 3d.

**RECEIVER—5 & 6 W. 4, c. 55—PRACTICE—VERIFYING
AFFIDAVIT.**

Lord SLIGO, Petitioner ; Sir SAMUEL O'MALLEY, Respondent.

MR. BLACKBURNE, Q. C., applied for an order, that the affidavit of the petitioner's agent be admitted, for the purpose of verifying the petition. He found it was necessary to obtain a special order, to receive the affidavit of the agent. Lord Sligo is abroad.

Affidavit of agent will not be admitted to verify petition under Sheriffs' Act, unless a strong case be made for dispensing with oath of principal.

LORD CHANCELLOR.

I do not like to extend the application of summary proceedings under this act to cases where no affidavit is made by the creditor himself, unless I see clearly why his affidavit should be dispensed with. Has any attempt been made to procure the affidavit of Lord Sligo himself? If you lay a special case before me, to shew why an affidavit of Lord Sligo cannot be had, I will consider it. At present I must refuse the application.

Thursday, December 6th.

LUNACY—JURISDICTION.

In re the Right Honorable GEORGE Earl of KINGSTON, a Lunatic.
DANIEL KEILY, Petitioner.

IN this case, Lord Kingston, the lunatic, having died, a petition was presented, praying the benefit of a certain order pronounced in the lunacy matter during the life of the lunatic.

The petitioner had been until lately in the occupation of the lands of Brigown, as tenant of the lunatic, and on the 29th May last, the lunatic being then alive, he presented a petition to this Court, entitled in the lunacy matter, and thereby stated that the Rev. Mr. Keily was Parish Priest of Mitchelstown, and, about the year 1829, had become tenant from year to year of these lands, at the rent of £4 an acre, but that when the first gale became due, his Lordship had directed his agent to take £2 for the future : Mr. Keily having undertaken to build a good

An order made in a lunacy matter may be carried into effect, though the lunatic dies after the order pronounced.

But the Chancellor cannot, after the death of the lunatic, enforce an order made during his life, he having been tenant for life and the execu-

tion of the order affecting the rights of the remainder-man, who has entered since the death of the lunatic.

Tenant for life having leasing power, makes an agreement for a lease, and afterwards becomes lunatic. By an order in the lunacy matter, the contract for a lease ordered to be executed. Lunatic dies. Petition entitled in the lunacy, praying to carry order into effect, refused, Court's jurisdiction being at an end.

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KINGSTON,
A LUNATIC;

Former peti-
tion, 29 May,
1839.

slated house, and his Lordship having declared he would then give him the lease usually given on the estate, namely, three lives or thirty-one years.

An entry had been made in the books of the estate by order of the Earl, to the following effect—"Take £2 a-year from the Rev. Mr. Keily, "until he builds a house on the premises."

In 1830 his Lordship became lunatic; and in July, 1833, the Rev. Mr. Keily died, having paid the abated rent to the time of his death. The petitioner was his brother and administrator, and stated that frequent efforts had been made to oblige him to pay the £4 rent after the death of the Rev. Mr. Keily, which he had uniformly resisted, continuing to pay the reduced rent, and getting a receipt as on account. The petitioner further stated, that the receiver in the lunacy matter distrained in 1837. The petitioner replevied; and the proceedings having been irregular, the receiver obtained judgment in replevin. In 1838, however, he was served with a notice to quit, and in Easter Term, 1838, with an ejectment on the title; but being unable to take defence, judgment was obtained, and an *habere* executed on 2nd September, 1838. The petitioner further stated, that in 1839, an action for use and occupation was brought against him, in which it was sought to make him answerable for the difference between the high rent and the low; but upon the trial of that action at Cork Spring Assizes, 1839, upon the production of the rental-books, the entry before-mentioned having appeared to the jury sufficient evidence that the rent was £2 an acre, and no house having as yet been built, the defendant obtained a verdict. The petition further stated, that the said Rev. John Keily had been prevented from building, for the short period he survived the contract, by the lunacy of the Earl; that the petitioner, after his death, was always ready to do so, and had, in fact, entered into an agreement with a builder for the purpose, but those acting for the estate repudiated the contract, and took several proceedings against him at law, by distress and otherwise, to recover the rent of £4 an acre; and when he proceeded to remove some of the old buildings, with a view to lay the foundation of the new, an action was brought against him for dilapidating the premises. The petition further stated, that after the execution of the *habere*, Lord Kingsborough, the eldest son of the lunatic, had put the Rev. Henry Disney into possession of the premises, and that all the petitioner's crops, of considerable value, were seized. The petition prayed that the petitioner might be declared entitled to hold the lands of Brigown, in the petition mentioned, for such term, and under such conditions as might seem just, and that the receiver might be directed to give petitioner possession of the said lands, notwithstanding the execution of the *habere*, undertaking forthwith to perfect leases and recognizances and to lay out a sum of £300, which the said Earl owed him,

in building upon the premises, or that the lands should be set up to be let for the usual term under the Court.

The matter of the above petition was moved on the 24th June by Mr. *John Waller*, for the petitioner, and resisted by Mr. *Webber*, for Lord Kingsborough the heir-at-law, the receiver, and the Rev. Mr. *Disney*; and, upon debate, the Court was pleased to make an order to the following effect:—

“It appearing to the Court, that in the year 1829 the Earl of Kings-
 “ton agreed to grant to the Rev. John Keily, deceased, a lease of a lot
 “of ground, containing twelve acres Irish plantation measure, called the
 “house quarter of Brigown, for three lives or thirty-one years, at
 “the rent of £2 per annum, on condition that the said John Keily
 “should build on the premises. Declare petitioner, as the personal
 “representative of the said John, entitled to the benefit of the said
 “agreement, and to have a lease granted to him for three lives or
 “thirty-one years, to commence from the year 1829, and that petitioner
 “should be forthwith put into possession of the said lands; and accord-
 “ingly, that the Rev. Henry Disney do deliver up the possession to
 “him; and that it be referred to Roderick Connor, Esq., the Master in
 “this matter, to inquire and report what description of house should be
 “built on the said premises; and that the said Master should approve
 “of a plan and estimate for building the said house, and report the sum
 “necessary to be expended in the erection thereof; and that the said
 “Master do nominate three lives who were in being at the time of the
 “making of the said agreement, to be named in the said lease; and that
 “the said Master should settle and approve of a proper lease, with such
 “covenants as to the said Master should seem fit; and that the said
 “Master should inquire and report whether the said Earl was in-
 “debted to the petitioner in any, and what sum of money; and if so,
 “whether it would be proper that such money should be applied in any
 “and what manner to the building of the said house; and that he
 “should inquire and report within what time the said house should be
 “built, and under whose superintendence. And in case the Master
 “should find the said Earl was not indebted to petitioner in any sum
 “of money sufficient for the building of the said house, then that the
 “Master should report what security the petitioner should enter into, to
 “complete the building of the said house within such time as the Master
 “should approve. And it was also referred to the Master, to inquire and
 “report what was the value of the crops on the lands and premises at
 “the time petitioner was dispossessed by the execution of the *habere*,
 “and whether the petitioner was entitled to any and what allowance in
 “respect of the said crops; and also, what compensation the said Henry
 “Disney is entitled to be paid, by reason of his having become tenant to
 “the said lands, and of his delivering up the same, and what are the

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 EARL OF
 KINGSTON,
 A LUNATIC.

*Order in the
 lunacy matter,
 24 June, 1839.*

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KINGSTON,
A LUNATIC.

Supplemen-
tal petition, 29
Nov. 1839, lu-
natic being
dead.

"funds of the said Earl applicable thereto, reserving further order until
"the Master should make his report."

Before the reference to the Master had been proceeded with, the lunatic died, and the Master having declined issuing a summons, on the ground that he had no jurisdiction, the present petition was presented on the 29th November, setting forth the former proceedings, and that petitioner had been put into possession in August, pursuant to the said order, and that the said Lord Kingsborough had succeeded his father as heir-at-law, and was also his personal representative, and praying that the Master be directed to issue summonses, and proceed under the order of June, notwithstanding the death of the lunatic.

Argument
for the peti-
tioner.

The *Solicitor General*, with whom was Mr. *J. Waller* for the petitioner, now contended, that the only question was one of jurisdiction, and that the jurisdiction of the Court did not fail upon the death of the lunatic (*a*). In *Ex parte Armstrong* (*b*), the petition prayed that the Master should make his report, notwithstanding the death of the lunatic, a reference having been made to him in the lifetime of the lunatic, to inquire, among other things, who were next of kin; and Lord Thurlow said, "The order does not abate by the death of the lunatic; any party may still prosecute it, and take out the Master's report." The same principle is laid down in *Ex parte M'Dougal* (*c*). In that case, the Master had disallowed a claim of the petitioner for costs, as attorney for the lunatic, on the ground that the date of the lunacy, as found by the commission, overreached the period of the alleged retainer. The petition prayed that the claim might be admitted, or put in a course of trial. The lunatic died *after* the petition was presented. It was admitted by counsel opposing the petition, that orders in lunacy might be made after the death of the lunatic, *upon a report made previously*. *Ex parte Grimston* (*d*). But it was objected, that where the report *had not been made in the lifetime* of the lunatic, no such direction could be given, as it would have the effect of administering the assets; and for this purpose, *Garnett's Case* and *Porchier's Case* were cited; but Lord Erskine said, "That in those cases the petition was refused, on the ground that it was presented after the death of the lunatic, after the time, therefore, when the administrator was entitled to full possession. But (he adds), in this case the petition was presented during the life of the lunatic, who has died since; and the only difficulty is that pointed out by the Master;" and he ordered that the petitioner should establish his claim at law against the administrator, adding, "The question afterwards will be, whether I have authority to pay out of the assets what may be

(a) Shelford on Lunacy, p. 22.

(c) 12 Ver. 334.

(b) 3 Bro. C. C. 238.

(d) Amb. 706.

"recovered in that action. My opinion is, that I have that authority:" and he ordered the petition to be retained, that the petitioner might bring an action, and that the sum found due by the verdict should be paid out of the funds belonging to the lunatic. These cases clearly shew that the Court has jurisdiction, notwithstanding the death of the lunatic. It may be contended, however, that the Court cannot now make an order to bind the present Lord Kingston, who claims as remainder-man, and that it should be open to him and the personal representative to dispute such order; but there is no pretence for this objection, as the present Lord was a party to the former order as heir-at-law, and is now administrator of the late Earl. Besides, it is clear he would be bound as heir-at-law, and even a remainder-man is bound, to make a lease pursuant to a leasing power, as promised by the late Earl, supposing he was tenant for life, the Court having declared him entitled to such a lease against him, at a time it had competent jurisdiction. *Shannon v. Bradstreet* (a); and in *Collisson on Lunacy* (b), it is laid down, "An order does not abate by the death of a *non compos*; and, therefore, "a reference directed to the Master in his lifetime may be prosecuted, "and the report made after his death."

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[LORD CHANCELLOR.—I fear, by any order I now make, I cannot bind the real estate.]

Mr. Litton, Q. C., and Mr. Webber, for the present Lord Kingston.—There being a party now representing the inheritance, the petitioner must file his bill. Lord Kingston had no power to grant such a lease. I admit that an order made would be valid as far as the personalty was concerned, but the Court has no jurisdiction to bind the real estate. Is there any case relating to real estate, where the inheritance was bound against a party representing it, and ready to contest the contract?

Argument
for the re-
mainder-man.

[LORD CHANCELLOR.—The cases cited by Mr. Solicitor were against persons representing the estate of the lunatic after his death; but here, Lord Kingston is remainder-man, and does not represent the estate of the lunatic.]

Mr. Litton.—The Court loses its jurisdiction over the realty by the lunatic's death. In *Perse v. Perse* (c), it was decided on demurrer, that the committee of the lunatic could not distrain after his death for the portion of the rent due in the lifetime of the lunatic, the lunatic having died before the gale day in the lease.

(a) 1 Sch. & Lef. 52. And see *Loury v. Lord Dufferin*, ante, vol. 1, p. 281.

(b) p. 318.

(c) Alo, & Nap. 35.

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KINGSTON,
A LUNATIC.

[**LORD CHANCELLOR.**—There was no question of jurisdiction in that case: the question was, whether the committee was assignee of the tenant for life under the statute? Is there any instance of a committee making cognizance as his bailiff?]

Mr. Litton.—*In re Hugh M'Mahon (a)*, the petition was for leave to distrain after the death of the lunatic, and your Lordship refused the motion, saying you had no jurisdiction.

[**LORD CHANCELLOR.**—I think I cannot act as against the real estate, Lord Kingston claiming as remainder-man. The only question is with respect to the personality; and, with respect to that, there is an account ordered, but those accounts were ancillary to the contract in relation to the land.]

Mr. J. Waller, in reply.—The question divides itself into two branches: first, as to the realty; secondly, as to the personality. As to the realty, the cases shew the Court has made orders affecting it after the death of the lunatic. In *Ex parte Roberts (b)*, the Court compelled the execution of a conveyance of the real estate to the remainder-man by Dr. Finney, who claimed under a deed executed by the lunatic, by virtue of a warrant of attorney, for the purpose of a recovery, to bar the settlement under which the remainder-man claimed, and enforced its order by attachment after the death of the lunatic (c). The principle which guides the Court is the same with respect to realty and personality. The Court can make no order after the death of the lunatic, which will have the effect of creating rights, but it has jurisdiction to carry out orders pronounced in his lifetime. From the necessity of the case, the Court has that jurisdiction. We do not seek here a new order; all we desire is, that that which was pronounced in June should not be rescinded. By that order the Court, in terms, declared us entitled to a lease, specifying the term and rent; the reference was only as to the details, covenants, &c. That order should be looked upon as having given us an equitable title, which the Court has jurisdiction to carry out in the lunacy matter. Sir Anthony Hart said that he had jurisdiction, after the death of the lunatic, to make the committee account, and that from the necessity of the case—*In re Barry (d)*—although he doubted if Lord Manners was right in making a substantive order to inquire who were the next of kin and heirs-at-law; and several other matters, after the death of the lunatic. In this case, the party is without remedy, unless the Court will carry out its own order; the agreement being such, that

(a) 5 Law Rec. 168.

(b) 3 Atk. 308.

(c) Shelford, 23.

(d) 1 Moll. 414.

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it cannot be enforced in a Court of Equity, the original order having been made by the Court exercising its jurisdiction as landlord. It would seem, that in the case in *Melloy*, the petition had not been presented in the lifetime of the lunatic; for if it had, *Ex parte Armstrong* (a) would have been completely in point, and yet that case was not cited. The remainder-man is bound by the order of June. *Shannon v. Bradstreet* (b). Besides, he appeared on the motion, and resisted it. He has now no new case; that order has been acted upon so far as to put us into possession, and the effect of refusing the present application will be to divest us of our title; whereas, if the order is carried out, and the lease executed, Lord Kingston can try the validity of that lease by ejectment. As to the personalty, the order of June directs the Master to inquire whether the late Earl was indebted to the petitioner in any and what sum of money—(this was very similar to the inquiry directed in *Ex parte M'Dougal*) (c)—and also as to the value of the crops seized at the time of the execution of the *habere*, and whether the petitioner was entitled to any compensation for those crops, and what are the funds of the said Earl applicable thereto. Now, these are matters of reference not necessarily connected with the lease, especially the latter, which, I submit, affects merely the personalty, and is precisely similar to *Ex parte M'Dougal*, except that, in that case, the Chancellor thought it was necessary to ascertain the existence of the debt, by directing an issue at law. Here, that fact can be better ascertained before the Master. As to the cases cited by Mr. *Litton*, they do not apply. The case of *Persse v. Persse* was upon the statute 23 & 24 G. 3, c. 46, for the apportionment of rent, where the tenant for life dies before the gale day, and the remedy is given either to the personal representative or assignee; and the Court held that the defendant could not justify as assignee under that act, because no part of the lunatic's estate is conveyed to the committee, who had no interest except as bailiff; an authority which ceased with the life of the lunatic. As to the case of *Hugh M'Mahon*, the petition was presented after the death of the lunatic, for liberty to distrain for rents due in his lifetime, and to receive which the administrator had a present right; but the application could not be supported, all the authorities requiring the petition to be presented in the lifetime of the lunatic, to give the Court jurisdiction. I submit we are clearly entitled to the reference with respect to the compensation for the crops.

LORD CHANCELLOR.

The question is, whether I have jurisdiction to make any order after the death of the lunatic, with respect either to the realty or personalty?

(a) 3 Bro. C. C. 238.

(b) 1 Sch. & Lef. 52.

(c) 12 Ves. 384.

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I should feel great difficulty in saying the Court had no jurisdiction to carry out its order after the death of the lunatic; but how can I bind a remainder-man by an order made in the lifetime of the tenant for life? I fear I cannot do so. It is said this lease would be contrary to leasing powers: that question, however, was not raised in the lunacy matter. I have, therefore, had no occasion to decide it. I regret that the petitioner should suffer by the death of the lunatic, as I felt he was entitled to the protection of this Court, and the order I made in June was well considered at the time. I thought great injustice would be done, if the petitioner was not relieved; but I have no doubt that the death of the lunatic terminates my jurisdiction as to the real estate. Then, as to the personal estate, the part of the reference with respect to it I cannot consider as unconnected with that which has respect to the realty. It is part and parcel of the same inquiry—first, as to the terms of the agreement; and secondly, how it was to be carried into effect. I must, therefore, reluctantly refuse this application, but without costs, and without prejudice to the plaintiff taking such proceedings as he may be advised.

—◆—
Friday, December 6th.

REPLEVIN—PRACTICE—ABUSE OF PROCESS.


COMERFORD in Replevin *v.* BLAKE and DOOLAN.

To warrant a party in issuing a writ of replevin he should have been in clear and unequivocal possession of the thing replevied at the time of the alleged taking.

Where a party issues a writ of replevin under improper circumstances he will be attached for his contempt, the writ will be quashed, and the goods ordered to be restored.

A WRIT of replevin had issued in this case at the suit of Comerford, directed to the sheriffs of the county of the town of Galway. The sheriffs had executed the writ, and had deprived the defendant Blake of the possession of 119 blocks of Marble, mentioned therein, and had delivered them to the plaintiff Comerford on his entering into the usual securities.

Mr. Keatinge, Q. C. (with whom were Mr. W. Brooks, Q. C., and Mr. H. Hughes), now moved on behalf of the defendant Blake, that the writ should be quashed, and that the plaintiff Comerford should be attached as for contempt, in having issued the writ under the circumstances stated in the affidavits, and also that the 119 blocks of marble should be ordered to be restored to the defendant Blake. The affidavits in support of the motion stated that for several months previous to the month of April last, one Doolan had been working at the quay of Aughlingham, adjoining the town of Galway, and that he had carried upwards of 120 blocks of marble to the Wood quay of Galway, where they had remained

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for some time ready for sale and exportation. The affidavits further stated, that in the middle of the month of June, John Francis Blake received advice from New York of an opportunity having occurred of effecting a sale there of a quantity of marble; and on the 30th of June he concluded a contract with the said Doolan for the purchase of 200 tons of marble for the sum of £410, £80 of which was paid on account on the 1st July. Blake then caused the blocks to be branded with the initials of his name in large and conspicuous characters. The affidavits further stated, that on the 5th July a replevin was issued at the suit of Henry Comerford, and that by virtue of that replevin Blake was deprived of 119 blocks of the marble, and that immediately afterwards Comerford shipped a quantity of marble to New York, upon his own account. The affidavits of Messrs. Comerford, Ireland, and Blakenay stated, that on the 2nd of April, 1837, Thomas Gerald Bateman executed a deed of assignment to Comerford of the marble at the Wood quay of Galway, and at the quarry, for good and valuable consideration, being certain debts due by Bateman to Comerford. The trusts of the assignments were, after payment of these debts to pay the balance of the proceeds of the marble to Bateman;—Comerford's affidavit further stated, that in some days after the execution of that assignment, Bateman gave him the possession of the marble, and that he continued in the possession thereof until the 1st of July, when Mr Blake branded same with his own initials, and he admitted that he had thereupon on the 5th of July issued a replevin to restore him to the possession of the marble; it further appeared, that on the 11th of June, Bateman filed a bill against Doolan for an injunction to restrain him from selling the marble already raised, or quarrying any more; and by that bill and the affidavit verifying it, Bateman alleged that Doolan was then in possession of the marble both at the quarry and at the Wood quay, and that he had before the date of the filing of the bill and affidavit, sold a quantity of the marble, and applied the produce to his own use. Bateman had also served an ejectment as of Trinity Term last, for the purpose of putting Doolan out of possession of the quarry. Mr. Keatinge, after stating the foregoing facts from the affidavits, submitted that they disclosed a clear case of an abuse of the process of the Court. A writ of replevin cannot properly issue, unless the party issuing it was in undisputed possession of the property when the alleged taking occurred. If it be issued under any other circumstances it is an abuse of the process of the Court, and the writ will be quashed, *Ex parte Chamberlain (a)*; *Shannon v. Shannon (b)*; and *M'Carthy v. Maguire (c)*.

() 1 Sch. & Lef. 320.

(') *Ibid.* 324.

() 1 Moll. 47.

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Mr. *Monahan*, with whom was Mr. *Fitzgibbon*, for the plaintiff Comerford.—This is really an application calling on the Court to decide upon affidavits, the question which is to be tried by the jury when the action of replevin comes to trial. The question for the jury will be, whether these blocks of marble are in fact the property of Comerford or Blake? In *Farrell v. Beresford* (a), Lord Manners decided that where there was a fair legal question to be decided, a writ of replevin, issued for the purpose of trying it, is not to be quashed. Replevin is a remedy frequently adopted to try a right of property; *Co. Litt.* 145-6; 2 *Stark. on Ev.* 714.

—◆—

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LORD CHANCELLOR.

Under the circumstances of this case I think the case of *Shannon v. Shannon* must govern the practice of the Court. It is true that the writ of replevin is applicable to other cases than that of distress for rent, but it should be used with caution, and the party who issues it does so at his peril, for if it should turn out that the writ was issued under improper circumstances, he is punishable for his contempt in suing out a writ of replevin, and under color of it depriving the party in possession of that possession which gives him a *prima facie* right of property. The replevin throws upon the defendant the onus of proving the property in himself, and unless the person issuing the writ had an unqualified and unequivocal possession, he has no right to throw that onus upon his adversary by resorting to that remedy, when other remedies, such as an action of trover or case, are open to him. In the present case some litigation had taken place between Bateman and Doolan as to the possession of the quarry, and in Bateman's affidavit filed on the 18th of June (subsequent by several weeks to the assignment to Comerford), he (Bateman) alleged that Doolan was then in possession of the marble at the Wood quay in Galway, and nothing has been brought forward to shew that from the 18th June to the 1st of July, when the possession was taken by Blake, any act of ownership as to the marble had been exercised either by Bateman or by Comerford. The possession of Comerford in April was at best equivocal, and in such a case the party had no right to resort to the summary process of replevin. I am bound to say, that I consider the issuing of the writ in the present case an abuse of the process of the Court. The writ must be quashed, I shall also award an attachment against Comerford for his contempt, but the attachment is not to issue until further orders; and let Mr. Comerford pay Mr. Blake the costs of the motion, and return forth-

(a) 1 Ball & B. 328.

with that portion of the marble which is now forthcoming, and refer it to the Master to ascertain the amount of the compensation to which Mr. Blake is entitled by reason of his being deprived of the marble, and let Comerford pay the amount of the compensation, when ascertained, and the costs of the defence.*

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* When the sheriff comes to execute a writ of replevin, his power to proceed may be put an end to by the defendant claiming *property* in the goods. If the sheriff proceeds to take possession of the goods after such claim has been made, he is a trespasser, and an action lies against him; *Leonard v. Stacey*, 6 Mod. 69; and in such action the claim or notice of property is the sole issue, per Holt, C. C., *ibid.* This also appears from the form of the original writ, *de proprietate probanda*, which recites that where a claim of property has been made, goods "cannot be replevied by the law and custom of England." The words of original writs are of great authority in shewing what is the law; Litt. sec. 122; Co. Litt. 93, *b.* But although the defendant may by merely making a claim of property, incapacitate the sheriff from proceeding under the writ, it is an indictable offence to make such claim falsely; Co. Litt. 145, *b.* If the authority of the sheriff be thus suspended by a claim of property,

he makes a return upon the writ to that effect, and thereupon a writ *de proprietate probanda* issues to try in whom the right is: see the form of this writ in *Tidd's Appx.*, chap. 42, sec. 20. It does not appear from the report of *Shannon v. Shannon*, that Lord Redesdale's attention was directed to the law in respect to these two writs, and it may perhaps be asked, whether the defendant in the writ of replevin, not having thought proper to make a claim of property, or not venturing to incur the penalty of making a false one, must not be taken to have *elected* to try the question upon the writ of replevin? The precedent established by Lord Redesdale, enabling a defendant in replevin to come and quash the writ and attach the plaintiff, when he might have got rid of the writ by simply making his claim to the sheriff, is calculated to deter any but a very reckless plaintiff from resorting to replevin as a remedy in any case but that of a distress for rent.

Monday, December 4th.

SPECIFIC PERFORMANCE—ABANDONMENT OF CONTRACT—PRACTICE—PLEADING—EVIDENCE.

GARRETT v. LORD BESBOROUGH.

Where there was a written contract for a lease, the instrument being perfect in all its parts and the tenant had held under it, but afterwards sought and obtained a reduction of rent, and being in fact unwilling to bind himself to so heavy a rent, omitted to call for the execution of a lease during several years, while the landlord was willing to grant it, he cannot afterwards, when the landlord serves a notice to quit, fall back on the contract and enforce the execution of a lease.

Where a tenant has held lands under an agreement for a lease, and the landlord considers that the tenant has abandoned or forfeited his rights under the contract, the practice in Ireland is to bring an agreement, and the landlord ought not to commence dealings at law.

BILL for specific performance. The defence relied on was an abandonment of the contract by the plaintiff. The questions discussed at the hearing were, *first*, whether the facts proved amounted to an abandonment of the contract; *secondly*, whether a certain deposition in the cause could be read for the purpose of proving that the plaintiff had in a conversation with an under-agent of the defendant *admitted* that he had abandoned the contract, the conversation deposed to not having been alleged upon the pleadings.

The plaintiff's father had held under the defendant's ancestors for many years, certain lands in the Co. Carlow, under a lease which expired with his own life in 1818. His son, the present plaintiff, continued in possession, and in the month of November in that year, made a proposal in writing to the land-agent of Lord Besborough, for a lease of 160 acres of the lands, for one life or 21 years, whichever should last longest, at a rent of £216 a-year.

This proposal was accepted by the land-agent, and subsequently ratified by the defendant. The plaintiff under-let the lands, his tenants remained in possession, and he continued to pay rent under that agreement.

In the year 1821 the plaintiff applied for a reduction of rent, in consequence of the pressure of the times, and the rent was accordingly reduced to £180 a-year. In 1823 a lease and counterpart, in pursuance of the original agreement, were executed by the defendant. In 1826 the defendant's son, Viscount Duncannon, having been given the management of the defendant's estates in Ireland, was applied to in London by the plaintiff to compound with him for the arrears, and to execute a lease at the reduced rent.

[Verbal admissions by the plaintiff of an abandonment of the agreement were relied on by the defendant. A conversation was stated to have taken place in the year 1826, between the plaintiff and an under-agent of the defendant named Patrick Walsh, who deposed in the cause that in two several conversations with the plaintiff at that period in London, the plaintiff admitted that he had come over to ask for a lease at the

with the under-tenants in occupation of the lands until he has recovered at law.

For the observations of the Lord Chancellor on the question of Evidence see post, pp 183, et seq.

reduced rent, and that Lord Duncannon had refused to grant any such lease, but permitted him to remain in possession as tenant from year to year, at a rent still further reduced to £160 British, and that the plaintiff further admitted that he had refused to execute the lease which had been already prepared and executed by the defendant in 1823, pursuant to the agreement, the rent being too high; Patrick Walsh further deposed, that in consequence of this conversation he entered the plaintiff's name in the defendant's rental, and always considered him as tenant from year to year, and filled up his receipts in the form usual on the estate for tenants from year to year.

The reading of the above deposition was objected to by the plaintiff. The abandonment of the contract and refusal to execute the lease had been put in issue in general terms by the answer; but, these conversations which were relied on as the evidence of those facts *were not referred to or stated in the pleadings*. The deposition was read, subject to the objection, and the cause was finally decided by the Chancellor on evidence exclusive of the above deposition. See *post*, p. 183.]

Lord Duncannon deposed in the cause, that while acting for the defendant he had agreed to allow the plaintiff to remain in possession, as tenant from year to year at the reduced rent, and had, at the same time, received a sum of £50 as a composition for £200 and upwards of arrears.

Some of the under-tenants deposed, that after the service of the notice to quit, about October 1835, they applied to the plaintiff for directions, and he told them that he had no title to the lands, and was at the mercy of Lord Besborough.

The plaintiff relied on the lease and counterpart executed in 1823, and the admission of the contract by the defendant in his answer, as conclusive evidence of the agreement. He also relied on receipts at the rate of £160 a-year, given by the land-agent of the defendant, in which the words "abated rent" appeared. The deposition of Peter Walsh, formerly a land-agent of the defendant, and who had been discontinued in 1826, was read on behalf of the plaintiff, and he gave evidence of the contents of the original proposal, and the execution of the leases in pursuance of it, and deposed to his being present at a conversation in London between Lord Duncannon and the plaintiff, in which the reduction of the rent was the subject of conversation, and that on that occasion there was no agreement that the plaintiff should become tenant from year to year. He admitted that there was a subsequent conversation at which he was not present.

At the expiration of the notice to quit, the defendant went to the lands and obtained attornments from the tenants, and was paid all rents which subsequently accrued due. It was proved by the defendant that the plaintiff had, since the 16th August 1832, when Lord Stanley's

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Act came into force, refused to pay the tithe composition, and the defendant was applied to and subsequently paid it. This was relied on by the defendant as proof that the plaintiff considered himself as tenant from year to year. The plaintiff, however, insisted that neither he nor the defendant were the persons bound to pay the tithes under that act, inasmuch as the lands were in the possession of under-tenants, who were examined, and claimed to hold their respective portion of the lands under the plaintiff, by virtue of agreements entered into prior to the 16th August, 1832.

Mr. Litton, Q. C., Mr. Brewster, Q. C., and Mr. Wall for the plaintiff.—Here the plaintiff has remained in possession from 1826 to May 1836, paying the abated rent. There is no sufficient evidence of the abandonment of the agreement or the refusal to execute. The only evidence is Patrick Walsh, who speaks to admissions in a conversation not put in issue by the answer, and which are, therefore, inadmissible in evidence against the plaintiff; *Blacker v. Phepoe* (a); *Fitzgerald v. O'Flaherty* (b); *Mulholland v. Hendrick* (c); *Hall v. Maltby* (d). Lord Duncannon's testimony is consistent with the case we make on behalf of the plaintiff.

Mr. Pennefather, Q. C., Mr. Warren, Q. C., and Mr. Sausse, for the defendant, contended, *first*, that there was sufficient evidence of abandonment without the deposition of Patrick Walsh, and, *secondly*, that the fact of abandonment of the contract and refusal to execute the lease having been put in issue by the answer, it was unnecessary to put specially in issue the evidence by which those charges were to be supported, and, therefore, that the deposition of Walsh was admissible.

LORD CHANCELLOR.

The bill in this cause was filed in 1837, praying a specific execution of a written agreement for a lease entered into between the plaintiff and Lord Besborough, in November 1818. The agreement is quite distinct in its terms and perfect in all its parts. Certain lands, containing 160 acres, are agreed to be demised at a rent of £216, for a term which is specified. There is no doubt on that part of the case. But the question has been raised for my consideration, whether the party who has filed this bill is now entitled to seek specific performance of that contract? A second question has been raised, as to the admissibility of the evidence of Patrick Walsh. He deposes to a conversation held by the plaintiff, admitting that he himself had repudiated the contract; the fact of such

(a) 1 Moll. 358.

(c) 1 Moll. 360.

(b) 1 Moll. 351.

(d) 6 Price, 210.

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admission is not put in issue, but the fact of refusal to abide by the contract is; and it is contended, that the evidence of Patrick Walsh must be rejected, on the authority of several cases which have been cited. If it were necessary to decide whether such evidence is or is not admissible on the pleadings as framed, it would require further argument before I would decide a question so important. The grounds of my judgment in this case are independent of the evidence which is thus brought into question. But the point which has been raised with regard to the admissibility of that evidence, is one of great practical importance, and I have felt it my duty to look carefully into the cases which have been cited on the point, although it is not necessary for me, in the present instance, to decide it. The authority of Sir A. Hart is relied on to shew that, under the circumstances of this case, the deposition of Patrick Walsh is not admissible in evidence. The authority of Sir A. Hart is very great, and deserving of the utmost attention from me; his opinion has the greatest weight with me; but I must examine the ground on which that opinion is founded. It does not appear, from the cases cited, that Sir A. Hart has actually decided the point in any case except one, *Mulholland v. Hendrick* (a); and that was a case where the admission relied on was an admission of fraud. I have attentively considered that distinction, and I own that I am not able to come at the principle on which the case of an admission of fraud is distinguished from any other. Sir A. Hart's reasoning is this:—He says, "Fraud is not a fact, but a conclusion of law deduced from facts. Therefore, a charge in the bill of fraud is not putting in issue a fact, but only an inference." I do not understand the practical application of this. We never hear of a bill charging fraud in mere general terms; facts are always stated, from which the inference of fraud is to be drawn. I cannot see how the circumstance that fraud is not a fact applies. Then, besides the cases on fraud, there are cases of admissions, where there is no charge of fraud in the case, and some of the *dicta* attributed to Sir A. Hart seem to go the length of saying, that in every such case the fact must be put in issue. I do not collect from the report what is the degree of certainty with which the fact is to be put in issue. Does it mean merely that it ought to be put in issue, that there was such an admission? That would not meet the mischief. Then, are the circumstances also to be stated? I do not find any case going that length. I shall advert to one or two of the cases referred to. Those relied on are *Mulholland v. Hendrick* (a) and *Farrell v. ———* (b). In the first of these cases, it was objected by the plaintiff, that the fact of fraud was not distinctly put in issue. In that case, *how* it was that the fraud was charged, or how it was confessed,

The principle is not clear on which admissions of fraud are distinguished from other admissions, in the case of *Mulholland v. Hendrick*, 1 Moll. 359, so as to make it more necessary in pleading to put one sort of admission in issue than another.

(a) 1 Moll. 359.

(b) 1 Moll. 363.

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does not appear. I cannot see the practical application of that case; and Lord Chancellor Hart seems to rely on his doing no injury to the party by rejecting the evidence. In the second case, it was deposed that the defendant had admitted that he had defrauded the plaintiff; and this evidence was rejected altogether, although, in the first case, Sir A. Hart said he never would decree on a confession, without sending the case to law for further inquiry. Therefore, the party would not have been damned, even if the evidence had been received. Then, the reasons given by Sir A. Hart in the second case, would seem to apply to all cases, whether of fraud or not; for he says, "If a stranger be admitted to swear to a conversation between him and the defendant, and no opportunity is given to the defendant to deny that any such occurrence passed, no man would be safe." This may be very true, but it is equally true of every case as of a case of fraud. Another case has been cited from the Exchequer in England, *Hall v. Malby* (a). That case is not a decision, but merely a *dictum* of Chief Baron Richards, a highly respectable authority; but in that case the value of that *dictum* is diminished by the circumstance, that Chief Baron Richards was under the impression that the point had been ruled by Lord Eldon in *Evans v. Bicknell* (b). But in *Mulholland v. Hendrick*, Sir A. Hart says he was counsel in *Evans v. Bicknell*; and, according to his recollection, no evidence was absolutely rejected on the ground that the issue was not properly pointed. Therefore, Chief Baron Richards was mistaken in supposing that the point had been ruled. The judgment of Chief Baron Richards in *Hall v. Malby* is therefore only expressive of his opinion how the pleader ought to frame his pleading. He says, he is aware it is often "a delicate matter for the consideration of the pleader, as it is often dangerous to reveal the evidence intended to be used." He observes, that in cases of fraud great injustice would be done, if evidence of admissions were allowed without being put in issue; for he says, that "In cases of fraud, declarations of a fraudulent purpose are often the very gist of the case." That observation, therefore, applies where the declarations are the gist of the case. I do not dissent from that. In my opinion, I say it with great respect, it would answer the ends of justice that each case should stand on its own grounds, subject to the exercise of the discretion of the Court to direct further inquiries. In some cases, great injustice might be done by admitting such evidence. On the other hand, great injustice might be done in other cases by rejecting it. It seems to me unwise in a Court of Equity to fetter itself by an unbending rule, such as contended for. It is the struggle of a Court of Equity, sometimes even in applying an act of parliament, to get rid of an unbending rule, in order to let in the justice of the case, much more

It attains the ends of justice to let the rejection or admission of evidence in equity objected to on the ground of being imperfectly put in issue in the pleadings, rest on the particular circumstances of each case, subject to the exercise of the discretion of the Court to direct further inquiries.

(a) 6 Price, 540.

(b) 6 Ves. 183.

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in applying the rules of practice which the Court makes for itself. What Lord Eldon said, in *Evans v. Bicknell*, did not at all involve the conclusion contended for. He said he would not lay much stress on such evidence. If he meant that it was inadmissible, he would not have spoken of the degree of stress which was to be laid on it; and Sir A. Hart says, the evidence was not rejected in the case of *Evans v. Bicknell*. I am not called on to decide. I am satisfied that the advice offered ought to be followed by every prudent pleader. Here no such question need be decided, for the fact of an abandonment of the contract is put in issue, and to establish that fact, it is not necessary to resort to the evidence of Patrick Walsh. The question is, whether the Court is to decree specific execution of the agreement of 1818? I am satisfied that the plaintiff is not entitled to call for an execution of that agreement. I shall refer to the bill, and to the evidence which I have, exclusive of the deposition of Patrick Walsh. The bill states, that two parts of the agreement were executed by Lord Besborough in 1823. It is perfectly clear, that at any time from 1823, the plaintiff might have called on Lord Besborough to execute the leases. It is equally clear he never has demanded the handing over of that lease, or declared his readiness to execute the counterpart. There is a statement in the bill which ought not to have been made by the person coming before the Court for specific execution of this agreement, viz., that the party did not require to have the lease, because he relied on the honor of Lord Besborough. That was very fair, if true. But is it true? The evidence is directly the contrary; and I think it is quite clear that the reason the plaintiff did not take the lease was, that he was unwilling to subject himself to so heavy a rent. A party must come here, relying not only on a fair contract, but on fair conduct on his own part in relation to that contract. Lord Duncannon states what passed between him and Garrett. He says that in May, 1826, conversations were had about the lease and the rent, on which occasion the plaintiff solicited a reduction of rent, stating that he could not hold them on the then existing terms; that a further reduction was made, and the reduced rent agreed to as a yearly tenant. This agreement was in 1818; the party goes into possession, and no pretence that the party might not have had an execution of the contract if he had wished. In fact, Lord Besborough did execute a lease and counterpart according to the contract; but plaintiff says he left it, relying on the honor of Lord Besborough. The landlord offers an abatement of the rent, but says, that must be an abatement at my own will. The tenant says, "Yes, I will have the abatement, but I will not bind myself to the high rent, in case the times turn out such that the bargain would prove a bad one for myself." Here there is neither good faith nor reasonable diligence. Then, in 1836, Lord Besborough serves a notice to quit. If, before that, Mr.

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Garrett had relied on the supposition that Lord Besborough was willing to execute the contract, he was then at least apprised of the contrary. But he never applies to Lord Besborough or his agents. This is not merely a neglect, but, to my mind, a proof that he considered the contract as no longer in existence. When notice to quit is served, the under-tenants come to him. Does the plaintiff say, "I will restrain proceedings?" No. He says, "Go and treat with Lord Besborough, I am at his mercy; I regret I did not before sell my *good will*." Then the tenants deal with Lord Besborough—he receives rent from them. There is a dealing between them in regard to the payment of the tithes. The situation of the parties is totally changed. I cannot, therefore, decree an execution of this contract; and I come to this conclusion on evidence entirely independent of the deposition of Patrick Walsh. If I were forced to decide the point which is raised with regard to his evidence, I would not decide it without further argument.* As to costs, I will give no costs, because of the course which has been taken by Lord Besborough. He ought to have brought his ejectment; instead of that, he deals with the under-tenants. Where there is a contract of this kind for a lease, the practice in this country is, that if the landlord intends finally to put an end to that contract, he ought to bring an ejectment, and not proceed to deal with the under-tenants.

Dismiss the bill with costs.

* In *Statham v. Hall*, Turn. & R. 30, evidence of a fact not at all put in issue by the defendant's answer was admitted. The bill prayed that the defendants might *interplead* as to a bond which had been deposited with the plaintiff for safe custody. On the part of one of the defendants, evidence was offered of the plaintiff having retained the bond in question under an indemnity from the other. It was objected by the plaintiff, that the evidence was not admissible, the question of indemnity not being in issue. The Court admitted the evidence, saying, the question was, whether the bill was a proper interpleading bill, and that evidence tending so much to shew the "complexion of the bill" must be admitted. Mr. Gresley, in his work on evidence, refers to the case of *Statham v. Hall*, as indicating that an interpleading suit is

an exception to the general rule. But it seems rather to be an instance of the exercise of a discretion by the Court, in admitting or rejecting evidence objected to on the ground of not having been put in issue. Mr. Gresley lays it down that "Of late years the rule has been considered as fully established, that the Court cannot notice matter, however clearly proved, of which there is no allegation in the pleadings." However, the cases cited by Mr. Gresley seem scarcely to bear him out in laying down the rule so broadly. If it be established, as he states, that the Court *cannot notice matter* not stated in the pleading, the necessity would be imposed on the pleader of setting forth in his pleading all the evidence intended to be produced. The same writer adds, in a note, "The rules respecting variance, which occupy

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"so large a space in other treatises, might follow here, for they depend on the principle, that a different thing has been proved from that which has been pleaded; but in consequence of the facility with which amendments are allowed, the objection fatal at common law is merely dilatory in equity, and a counsel rarely ventures to incur the prejudice of so vexatious a proceeding." It is clear, that the "rules respecting variance" must speedily have a place in Courts of Equity, if the rule, which is said by Mr. Greasley to be of late years established, gain a footing. But many cases must be overruled in order to establish such a rule. *Wheeler v. Trotter*, 3 Swans. 174, is a case, which, in principle, bears a good deal of resemblance to the case in the text. The plaintiff had appointed the defendant to a certain office of Register for three years, and afterwards agreed to grant him a further term of four years. The bill was filed for specific performance of that agreement. The defendant, in his answer, charged, in general terms, that the plaintiff had been guilty of misbehaviour in his office, which disentitled him to the relief he sought; and, at the hearing, proposed to give evidence of *particular acts* of misconduct which had not been specified by the defendant in his answer. This being objected to, Lord Talbot, Chancellor, said, "The question is, whether these matters are sufficiently put in issue, or not; for it is certain they might have been more precisely so, by enumerating the particular facts;" and admitted the evidence, observing, that "In criminal matters, it is not only necessary that the nature should be set out generally, but that the single fact should be specified by which the party may be enabled to defend himself in a matter which is final against him. But

here, if the plaintiff thinks he can give further light in the affair, or the Court has any doubts about it, there may be directions given for a further inquiry." In *The Duke of Buckingham v. Ward*, 3 Bro. P. C. 581, a paper, purporting to be a written acknowledgment by the plaintiff, was produced in evidence, though not set forth or at all alluded to in the pleadings, and although the case made in his pleading by the party producing the document was inconsistent with his case at the bar relying on the document. The Court held that it ought to be had no regard to, not only because it had a suspicious appearance, but because it was not insisted on in the defendant's answer." Still the evidence was received, and the Court exercised its judgment upon it. In a late case before Lord Langdale, *De Tastet v. Le Tavernier*, 1 Keene, 174, the defendant alleged generally, in his answer, that one Pere Elizee, mentioned in the bill, had committed *various acts of bankruptcy* before the date of a certain deed relied on by the plaintiff. Evidence of *particular acts of bankruptcy* was given and admitted. Lord Langdale, in giving judgment, said, that the evidence thus given was open to considerable observation, but that he was not at liberty to reject it; but added, "I cannot say that the plaintiff appears to me to have had all the means which might have been desired to meet this part of the case." His Lordship accordingly directed an issue, "whether Pere Elizee committed any and what act of bankruptcy before the date of the assignment." In the case of *Earle v. Pickin*, 1 Russ. & M. 547, the question in the cause turned upon the fact of notice of a settlement. Two witnesses swore that the defendant had admitted that he had had notice, and one of them swore to a conversation which amounted to notice. Neither the admission nor

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the conversation had been stated in the bill. The evidence was read, but the Master of the Rolls made the following order:—"It appearing that neither the names of the witnesses who have deposited to the notice, nor the particular facts of notice were stated in the bill, refer it to the Master to inquire whether, at or before the time of the purchase, the defendant had notice," &c. The plaintiffs having appealed from that order, Lord Lyndhurst, C., said, that the evidence contained in the deposition would certainly, if believed in its fullest extent, dispose of the whole case; but as it was possible that the witnesses might be mistaken as to the date, the further inquiry was properly directed. The order of the Master of the Rolls was accordingly in substance affirmed, but was afterwards

varied on another point. This case seems to establish, that proof of an admission by the defendant will be received, and the Court will exercise its judgment upon it, although such admission be not stated in the bill; and the observations of Lord Lyndhurst would indicate that the Court may *decide* on such evidence without further inquiry, unless it is of opinion, on considering the evidence, that there is a possibility of mistake or false swearing on the part of the witnesses. The cases, both ancient and modern, shew that Courts of Equity have always exercised a discretion of admitting evidence, whether set forth in the pleadings or not, and seldom exercise the power of *rejection*, without having the evidence read, and exercising its judgment upon it.

CHANCERY.

PETTY BAG SIDE.

Tuesday, 31st January 1840.

PRACTICE—PETTY BAG SIDE—SCIRE FACIAS ON RECOGNIZANCE.

THE QUEEN v. CHARLES BARRY and Wife.

Two writs of *scire facias* issued in this case, upon each of which the sheriff of the county of Cork had returned *nihil*. The Officer was then applied to, to enter the rules to plead, but he declined to do so, considering that by the practice of this Court he was not warranted in entering the rules except upon a return of *scire feci*.

It appeared that Charles Barry, one of the defendants, had been appointed receiver in the cause of *Birch v. Oldis*, at the Equity side of the Court. On the 21st December 1835, he entered into the usual recognizance with Dame Anne Roberts and Boyle Travers as his sureties, and having afterwards, in 1837, left Ireland to reside in France, he was removed from the receivership, and had not accounted. Mr. Barry subsequently married Lady Roberts, one of his sureties, and they both resided in France; the latter being possessed of some landed property in the county of Cork.

Upon the 25th January 1839, a conditional order to put the recognizance in suit was obtained, which was personally served on Barry and his wife at Paris, and was afterwards made absolute, no cause having been shewn. Two writs of *scire facias* accordingly issued, directed to the sheriff of the county of Cork, where the lands of Lady Roberts lay, upon each of which the sheriff made the usual return of *nihil*.

Mr. William Smith now moved that the Clerk of the Crown be directed to enter the rules to plead. In proceedings by *scire facias* on a recognizance, if the sheriff return *nihil*, a second *scire facias* issues; Tidd says "on the return of *scire feci*, or of two *nihil*s, a four day "rule is given on the writ for the defendant to appear and plead, or an "extent to issue. If the defendant do not appear on the first rule, or "appearing, do not plead on the second, judgment may be entered "for the king" (a) *Primate Boyle's Rules* provide that upon making it appear that the party cannot be found, or is beyond sea, the *scire*

Where the sheriff returned *nihil* on two several writs of *scire facias* issued on a recognizance entered into by parties who resided abroad, and directed to the sheriff of the county where the estate of the party lay, rules to plead may be entered as on a return of *scire feci*.

(a) 2 Tidd, 1092, 9th Ed.

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facias may issue into any other county where the estate lieth (a). This has been done in the present case: the parties had full notice of the intention to proceed, by personal service of the order to put the recognizance in suit. No injury can arise from permitting the rules to be entered; as the parties may, if they have merits, obtain leave to plead, and unless this application be granted the recognizance may prove unavailable.

THE LORD CHANCELLOR made the order directing the Officer to enter the rules to plead.

(a) Primate Boyle's Rules, No. 37.

Friday, 24th April 1840.

PRACTICE—PLEADING—PARTIES.

PAYNES v. CREAGH.

If a mortgagee of lands subject to an annuity files a bill of foreclosure, and makes the annuitant a party the bill will be dismissed with costs as to the annuitant, for he is an unnecessary party.

THIS was a foreclosure cause.—The Master had made his report, and the cause now came on for further directions upon report and merits. The only question at the hearing was raised by one of the defendants, who insisted that the bill as to him should now be dismissed with costs. His case was that he was entitled to an annuity prior to the plaintiffs' mortgage, and, consequently, that he had been unnecessarily made a party to the suit.

Mr. Collins, Q. C., and Mr. Maley, for the annuitant.—The annuity is prior to the plaintiff's mortgage. The plaintiff is entitled to a decree for the sale of the lands, but they must be sold subject to the annuity. It is, therefore, not necessary that the annuitant should join in the conveyance to the purchaser, nor has the Court any jurisdiction to compel him to join. Therefore, no purpose is served by having made him a party, or keeping him any longer before the Court. It follows that the bill should now be dismissed with costs as against him; *Delabere v. Norwood* (a), *Bodkin v. Fitzpatrick* (b); *B. of Winchester v. Beaver* (c).

Mr. Moore, Q. C., for the plaintiff.—The annuitant was a necessary party to the suit. His annuity-deed created a term of 200 years, and vested it in a trustee to secure his annuity. The legal estate in the lands is consequently now outstanding in that trustee. He is, therefore, a necessary party to make title to a purchaser. It is said we cannot compel him to join in the conveyance. His annuity is a small one of

(a) 3 Swans. 144.

(b) 1 Hog. 308.

(c) 3 Ves. 314.

100 a-year, and the property we are about to sell is very extensive. We have a right to bring him before the Court, in order that a portion of the property sufficient to secure his annuity may be set apart, and then he ought to join in conveying the legal estate in the residue discharged of his annuity.—[LORD CHANCELLOR. How can he be called on to join in conveyance to a purchaser?—At all events he comes too late with this objection. He has gone before the Master and proved a sum of £250 due to him for arrears of his annuity. The Master has included that in his report and it will be included in the decree which the Court is now about to pronounce.

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I must dismiss the bill as to this annuitant, whose annuity is prior to the plaintiff's mortgage. He was an unnecessary party. However, as he has gone before the Master and proved for arrears of his annuity, I will give him no costs. I, therefore, dismiss the bill as to him without costs.

Mr. Collins, on behalf of the annuitant, afterwards proposed, that rather than lose his costs, he would join in the conveyance to the purchaser.

Mr. Brewster, Q. C., for the inheritor, objected to any arrangement which would throw the costs of the annuitant upon the estate, and submitted that if his costs were to be paid at all, the plaintiff should be at the loss of them, he having unnecessarily made the annuitant a party.

Finally, the decree was made, giving the annuitant his costs against the plaintiff, he to have them over against the fund, and the annuitant to join in the conveyance to the purchaser.

Friday, April 24th.

ILLEGALITY OF CONTRACT—*PARTICEPS CRIMINIS*.

HAMILTON v. BALL.

THE bill prayed that a certain bond for £500, dated 14th April, 1820, should be delivered up to be cancelled, and an injunction against proceeding upon it at law. The plaintiff's case was, that he and his

from taking more of the spoil than his share, for the Court will not interfere to enforce honor among thieves.

A party to a fraud cannot file a bill against his accomplice, to prevent him

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father had joined with the defendant in procuring a sale of certain lands in the county of Meath to be made to the defendant, under a decree in the cause of *Hobhouse v. Hamilton*, in this Court; and that the bond in question had been passed to the defendant solely for the purpose of securing a fulfilment of the arrangement.

It appeared that the decree in the cause of *Hobhouse v. Hamilton*, under which the collusive sale took place, had been made in the year 1819. The arrangement entered into was, that the defendant Ball should pay to the plaintiff's father, for his own purposes, £250 in cash, and should bid £500 in the Master's office for the lands, at which price it was agreed that he should be allowed to be declared the purchaser. This agreement having been made, and the £250 paid to the plaintiff's father, the bond now in question was executed, and deposited in the hands of one Kettlewell, who was to hold it until the intended sale of the lands to Ball should be confirmed, and the bond was then to be returned to the plaintiff's father; or, if the sale to Ball for £500 should by any unforeseen circumstances be defeated, the bond was then to be delivered to Ball.

The defendant Ball bought the lands accordingly, "by auction," in the Master's office for £500. The sale was confirmed, and he went into possession.

Plaintiff's
bill stating
collusive sale.

The plaintiff, by his bill, stated the facts relating to the above arrangement, and they were proved in the cause by one Wright, who had been the attorney for the plaintiff's father in the cause of *Hobhouse v. Hamilton*. He swore minutely to the circumstances of the agreement, of which he deposed that he himself was the proposer and manager.

Kettlewell with whom the bond was deposited afterwards died; he had been the attorney of Ball, the defendant; and the latter, after Kettlewell's death, obtained possession of the bond. It appeared that Ball held certain other lands by lease from the plaintiff Hamilton, and that lease being about to expire, he endeavored to procure a renewal of it on easy terms, by threatening to set up the bond and insist on its payment. In 1837 he applied to the Queen's Bench, and obtained leave to enter judgment upon it.

It was proved in the cause that the defendant had, on various occasions, *admitted* that there was nothing due on the bond.

Defendant's
answer deny-
ing it.

The defendant, in his answer, swore that no such agreement or transaction as that stated in the bill ever took place, and that, in fact, the bond was passed to him in discharge of a balance appearing due on foot of an *account settled* between him and the plaintiff. He added, however, that even if the case made by the bill were true, the plaintiff was not entitled to come into a Court of Equity for relief. No evidence was given of the settled account alleged in the answer.

Mr. *Blackburne*, Q. C., stated the case for the plaintiff, as set forth in the bill.

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[LORD CHANCELLOR.—You state yourself out of Court. If the defendant were coming here to have the benefit of this bond, I would not assist him; but you come here as a plaintiff, to get rid of a bond entered into for a very dishonest purpose.]

Mr. *Blackburne*.—This was merely an arrangement between the parties to sell the lands in that way. It does not appear that any person was defrauded.

Mr. *Blake*, Q. C., and Mr. *J. Plunket*, for defendant.

The consideration of the bond is sworn by the defendant, in his answer, to have been a settled account. The defendant was unable to produce witnesses to prove that fact, because no person was present when the account was settled, but the plaintiff and defendant. At all events the plaintiff, on his own shewing, is not entitled to relief. A party to an illegal agreement cannot come here to have the benefit of it. *Bateman v. Ramsey* (a); *Brackenbury v. Brackenbury* (b); *Curtis v. Perry* (c).

Mr. *Pennefather*, Q. C., in reply.—The plaintiff stands in the position of a *surety*. He joined his father in this bond, but he never received any of the money. The purpose of the sale in the cause of *Hobhouse v. Hamilton* was to pay certain creditors of the name of Nangle. They were paid. Peter Roe, their solicitor, was cognizant of the agreement. No one was defrauded; there is not a tittle of evidence to that effect. No doubt, the technical rule of the Court was violated, but the arrangement must be taken to have been made with the consent of all parties. Suppose there had been a *consent* actually signed in the cause, would the Court say that such an arrangement would disentitle the plaintiff here to get up this bond and have it cancelled? Even if I were wrong in that view, the defendant here has altered the case by swearing, in his answer, to another consideration for the bond. The case made by our bill is, substantially, that no consideration was given for this bond. The defendant denies that upon his oath, and swears that the bond was passed to him for the balance of a settled account; and he further swears that the whole of the statement as to the agreement for the sale of the lands is a falsehood. That being so, can his counsel now at the bar turn round and say, that his own client has

(a) *Sausse & Scully*, 459.

(b) 2 Jac. & W. 391.

(c) 6 Ves. 739.

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sworn falsely, and *because* he is perjured, he is entitled to the decree of the Court?

LORD CHANCELLOR.

I cannot alter the view I have taken, that the plaintiff's own case is sufficient to put him out of Court. As to the defence which is set up, I am convinced by the evidence that it is a fraudulent one. The defendant denies the transaction as to the sale of the lands in *Hobhouse v. Hamilton*, and states that the bond was passed to him for valuable consideration, a promissory note, and, besides that, monies advanced; and he swears, that for the balance thus due, this bond was passed. The reality of this defence is impeached by all the circumstances, and by the defendant's own conduct and admissions. It has been proved that he made repeated admissions that he claimed nothing on the bond; that he retained it in his possession solely for the purpose of compelling the plaintiff to grant him a new lease of some lands which he held under him. All that is inconsistent with the case which he now sets up. He might have proved the account, which, he says, was settled, or, at all events, he might have proved that there were dealings between the parties, out of which an account could have arisen; but he has not attempted to do so. And when his conduct with reference to this bond, and his admission that nothing was due on it, are considered, if, in the face of that evidence, he had gone into proof that there was money due on it, it would have required coercive proof of the fact, in order to give any credibility to such a case. Then, the plaintiff's counsel say, that the defendant not having, in his answer, relied upon the illegality of the transaction out of which the bond arose, but having denied it on his oath, that he is not at liberty now to rely at the bar on an illegality which he has denied. It is true he has denied it, but he has also raised the question as to the illegality, by insisting, in his answer, that even if the plaintiff's case made by his bill were true, the Court could give him no relief. But, independent of that, I cannot admit the proposition, that it is not competent to the Court itself to take notice of the objection to the plaintiff's bill. The Court is bound, for the sake of the public, to take notice of it. I entertain no doubt upon the case. This bill cannot be entertained. I say so on the facts of the case, and upon the rules of the Court, and upon public policy. If there was any doubt upon it, the case of *Bateman v. Ramsay* (a), would go a great way to bear me out in coming to the conclusion I have come to. In that case, the Master of the Rolls said, that no matter whether actual injury was done by the transaction or not, the illegal nature of it was sufficient to prevent the Court from relieving a party under such circumstances. It is a mistake to call it a mere technical rule which has been violated.

A party to a fraudulent contract filing a bill against his accomplice to prevent him from violating the agreement, will be dismissed, although the defendant falsely denies the existence of the contract, and sets up a fictitious case, on oath, by his answer; for this Court will object to the illegality, even if the defendant does not.

(a) Sausse & Scully 459.

It was a fraud on the *Court*, a fraud on the *public*, and a fraud on the *creditor*.

I do not think it can be said that the plaintiff here is merely a surety. In one sense perhaps he is, if the circumstance that he got no money will make him one; but he was a party to the transaction by which his estate was exempted from public sale, and made matter of private arrangement, and, although worth £750, sold nominally for £500, while £250 go into the pocket of the elder Hamilton, and whilst the public is led to believe that the lands have been *bona fide* sold by public auction for £500. I would be opening the door to the most abominable frauds, to fraudulent contrivances for defeating the rights of creditors seeking to recover their just demands, if I were to permit this plaintiff to come here with such a case as this. It is ingeniously said, what if there had been a *consent* in the cause to the same effect as this private arrangement? And then it is argued that this is substantially the same thing as if there had been such a consent. But could there have been such a consent, and could such a consent have been made a rule of Court? Or, if it was made a rule of Court, can it be said that a purchaser would have been safe in purchasing under an order made upon such a consent? It is said, on behalf of the plaintiff, that it is not proved that any of the creditors were injured. As to that point, it is not proved that they were *not* injured. It is sufficient, however, for me, that creditors *might* have been injured, to render it incumbent upon me, sitting here, to refuse to entertain this bill; and I am bound to make the defence in answer to such a suit, not for the sake of the defendant, who was a party to the transaction, but for the sake of the public.

As to costs, I cannot give the defendant any costs. He has shaped his defence in a way in which, I am bound to say, upon the evidence, is utterly false. I, therefore, dismiss the bill, without costs.

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v.

BALL.

An agreement to bring about a sale of lands in the Master's office, to a particular person at a certain price is a fraud on the Court, on the public, and on the creditor.

Tuesday, April 28th 1840.

DEVISE—SUBSTITUTION BY CODICIL.

COMMISSIONERS OF CHARITABLE DONATIONS v. COTTER.

Although a codicil to a will professes to substitute a devise of one denomination of land for another, it does not always follow that the devise under the codicil is to be subject to the same incidents and conditions as the devise in the will.

Testator having a power to appoint by deed or will, executed a will, and afterwards a deed, and then a codicil to his will. By his will he appointed four denominations of land to his four sons, giving one denomination to each and his heirs, but added a clause of survivorship between them. By the deed, he partly displaced the appointment contained in his will, and appointed to his third son and his heirs the denomination of land given by his will to his fourth son, leaving the latter without provision.

Then, by the codicil to his will, he appointed to his fourth son and his heirs another denomination of land 'instead of' that given by the will. *Held*—that although the appointment by the will would have been subject to the clause of survivorship, the appointment by the codicil was absolute to him and his heirs.

By deed dated 7th October, 1811, certain stocks and monies were vested in trustees, on trust, to pay the interest to Isabella Lady Cotter, for life, to her separate use; and, after her death, to pay the principal to such of the children then unmarried of Sir James and Lady Cotter as Sir James should by deed or will appoint; in default of such appointment, equally to the children who should be living at Sir James's death. And the trustees were empowered to invest the monies from time to time in the purchase of land, of which they were to stand seised, to the like uses.

The trustees accordingly laid out £6,110 of the money in the purchase of the lands of *Gneeve*, *Ballygriffin*, *Knuttery*, and *Gartaneelig*, which were accordingly conveyed to Sir John Franks, as a trustee for the parties. Sir James Cotter, by his will, dated 28th January, 1828, reciting his power, appointed the lands to his four younger sons:—*Ballygriffin* to his son John and his heirs; *Gartaneelig* to his son George and his heirs; *Knuttery* to his son Henry and his heirs; *Gneeve* to his son Nelson and his heirs; *to go to them immediately from and after the decease of Lady Cotter; and in case of the death of any or either of his said younger sons, before he or they should be respectively entitled thereto; then the part or share of him or them so dying to go to and be divided amongst the survivors of them, equally share and share alike.*

Subsequent to the date of his will, Sir James Cotter, by deed dated 9th April, 1828, irrevocably appointed Knuttery to his son George and his heirs, thereby displacing the appointment of those lands by his will to Henry. By a codicil, dated 29th April, 1828, the testator, after reciting that, since the execution of his will, he had irrevocably appointed Knuttery to George, proceeded thus—"And I hereby revoke "the appointment of Knuttery to my son Henry in the annexed will "contained, and *instead thereof*, I appoint unto him, his heirs and "assigns, the lands of *Gartaneelig*."

[The question in the cause was, whether this appointment of Gartaneelig to Henry was subject to the clause of survivorship contained in the will?]

Sir James Cotter died, and Henry, one of the four sons, afterwards

died in 1830, his mother, Lady Cotter, being still alive, and in receipt of the rents of the four denominations of land, in virtue of her life estate therein.


Henry, by his will executed shortly before his death, dated 17th December, 1830, devised the lands of *Gurtaneelig* to his brother, the Rev. George Cotter, *in trust, for the purpose of promoting Scriptural Education in the parish of Raham*, and he desired that trustees might be appointed by his said brother, so that his wishes might be fulfilled in this respect *for ever*.

The Commissioners of Charitable Donations then filed their bill to have the trusts of Henry's will performed, his three brothers, or some of them, insisting that Lady Cotter being still alive, and Henry having died before he "became entitled" to the lands, the clause of survivorship in the will operated to give *Gurtaneelig* to the survivors, subject to Lady Cotter's life estate.

The Attorney-General, for the Commissioners of Charitable Donations.—There are two points to be considered—First, whether the words, "in case of the death of any of my said sons before he or they shall be entitled thereto," referred to the event of the death of any of them before the testator himself, or before Lady Cotter. We say the remainder vested in the sons, and that they became "entitled thereto" on the death of the testator. *Doe v. Prigg (a)*. It is true, the will says that the lands shall go to them on the death of Lady Cotter. But subject to her life estate, the remainder vested in the sons immediately on the death of the testator. If the Court agrees with us in this view of the case, it decides the question for the plaintiffs, for Henry did not die until after his father.

[The LORD CHANCELLOR intimated that he could not adopt this view of the will. He thought that the context shewed that the words referred to the death of Lady Cotter.]

Attorney-General.—Then the second question is, whether the appointment by the codicil, to "Henry and his heirs," is subject to the clause of survivorship contained in the will? We say no. This is not the case of a substitution of one devise for another; for, at the time of the codicil, there was no subsisting devise or appointment to Henry whatever. The deed appointing *Knuttery* to George had already destroyed the appointment by the will, of those lands to Henry. Therefore, the testator, in making his codicil, was making a provision for a son wholly unprovided for by his will; and by that codicil he appointed *Knuttery* to him

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(a) 8 Barn. & Cr. 231; *ibid.* 240.

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and his heirs. The Court cannot cut down that provision, or clog it with any condition. In *Holder v. Howell* (a), that principle is laid down by the Court. The cases relied on by the defendants are cases of legacies bequeathed by the will, and merely altered as to *quantum* by the codicil. In such cases, it is true, the Courts have held that the conditions and limitations in the will attached upon the bequest in the codicil. Those cases have no analogy to the present, for here the appointment in the will had been destroyed before the codicil was executed.

Mr. *Litton*, Q. C., for the defendants.—The words “instead of” are words of substitution very distinct, and have always been held to make a devise or bequest in a codicil subject to the same conditions and incidents as the original devise or bequest. *Seacroft v. Maynard* (b); *Crowder v. Clowes* (c); *Cooper v. Day* (d); *Lord Shaftesbury v. Duke of Marlborough* (e).

LORD CHANCELLOR.

Sir James Cotter, by his will, appointed the lands of Knuttery to his son Henry, Ballygriffin to George, and two other denominations of land to two other sons; and as to all of them, he declares that such respective parts of the said lands should “go to them immediately after the death of his wife, Lady Cotter. And in case of any of his said sons “dying before he or they should be respectively entitled thereto, then the “share of him or them so dying to go to and be divided among the survivors.” The will certainly might have been more explicit, and might have said expressly, “in case any of them die before Lady Cotter;” but it says what is tantamount to that, for it says the lands shall *go to* them immediately after her death; and then states that the survivorship is to take place if any of them die before he is *entitled thereto*. It is contended that the interest in remainder vested, in point of law, immediately on the death of the testator, subject to the life estate of Lady Cotter, and that, consequently, the words *entitled thereto* may refer to that legal vesting of the estate, and not to the period at which they were to become actually entitled to the possession; but in the natural construction of the whole clause, the survivorship was to take effect in case any of them died before Lady Cotter, the period when they were, in the ordinary sense of the words, to become “entitled thereto.” Therefore, as to the first point insisted for by the plaintiffs, I cannot take their view of the will. However, the second point on which they rely is, I

(a) 8 Ves. 97.

(b) 3 Bro. C. C. 230.

(c) 2 Ves. jun. 449.

(d) 3 Mer. 153; S. C. 1 Ves. jun. 279.

(e) 7 Sim. 237.

think, better founded. They say, admitting the operation of the clause of survivorship in the will, that they claim under the codicil as a substantive devise of Gurtaneelig to Henry and his heirs. The defendants say that the codicil merely substituted the lands of Gurtaneelig for the lands of Knuttery, mentioned in the will, and that the devise by the will being subject to the clause of survivorship, so must the devise by the codicil. Their argument is, that by force of the words "instead of," all the incidents to the original devise attach on the one which is substituted. They insist that by force of those words "instead of," all the incidents to the original devise necessarily follow. But in all the cases cited in support of that doctrine, the Court was looking to the intention of the testator. The case of *Crowder v. Clowes* (a), where the condition was held to attach, is really not a very intelligible case. I think there must have been something in it not stated by the reporter. The case of *Leacroft v. Maynard* (b), in which it is said that Lord Thurlow established such a position, really does not establish any such thing. Lord Thurlow could not have decided that case otherwise than he did, for the personal estate had been specifically bequeathed, and he could not have decided the case otherwise, without overturning the specific bequest. Here the lands of Knuttery had been appointed by deed irrevocably to George, and the codicil states them to have been so appointed. That appointment was without any clause of survivorship, and yet I am called on to say, when the testator goes on to devise Gurtaneelig to Henry, that it is to be subject to the clause of survivorship in the will. I am called on to work a disharmon on this supposed principle, that the words "instead of" must necessarily have the consequence of attaching all the incidents of the original devise.

It was stated in the argument, without any necessity, for it was not at all before me in evidence, that the opinion of a very eminent counsel, the late Mr. Saurin, had been taken, and was different from the view which I have taken, and which I was disposed to take from the commencement. I think if he had had an opportunity of hearing it argued as I have, he would have come to a different conclusion from that which is attributed to him. Feeling no doubt on the case, I do not think I should be warranted in sending it for the opinion of a Court of Law. I felt no doubt upon it from the commencement; but being told that that eminent counsel had given such an opinion, I have given it the fullest consideration.

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(a) 2 Ves. jun. 449.

(b) 3 Bro. C. C. 232.

Saturday, May 9th, 1840.

**HUSBAND AND WIFE—WIFE'S REVERSIONARY
INTEREST—WIFE'S CONSENT TO WAIVE
HER EQUITY.**

BATT and Wife v. CUTHBERTSON.

A married woman entitled to a reversionary life-estate in the event of surviving her husband, cannot by consenting to waive her interest give the Court the power to dispose of it.

THE plaintiffs, Benjamin Whiston Batt and Julia Batt intermarried, in the year 1809, and subsequently the plaintiff Benjamin became seized of the lands of Corballis as tenant in tail. In the year 1828 he suffered a recovery, and being in embarrassed circumstances, entered into an agreement with William Joly for a sale of the lands for a sum of £3000. His wife, the plaintiff Julia, agreed to join in the conveyance in consideration of £1000 being secured to her in the event of surviving her husband.

In pursuance of the above agreement, by indenture bearing date the 19th day of May 1828, between the plaintiff Benjamin Batt of the first part, Julia Batt of the second part, and John Carter Barrett and James Cuthbertson of the third part, reciting that the said plaintiff Benjamin had executed his bond and warrant of attorney in the principal sum of £1000, conditioned as in the said deed mentioned, it was stipulated, that the trustees should levy the said sum together with the interest thereof and pay the same to the said plaintiff Julia, in the event of her outliving her said husband, and in case the plaintiff Benjamin in his lifetime paid the same to the said trustees, that then they should lay out and invest the same in good and sufficient security with the consent of the plaintiffs, and pay the interest thereof to the plaintiff Benjamin during his life, and after his decease to apply the principal and interest then due thereon to the sole and separate use of his said wife, the plaintiff Julia. Judgment was entered on the bond in Trinity Term 1828.

The sale of the lands having been completed, the purchaser paid his purchase-money, and thereout £1000 was paid to the trustees, and invested by them in the $3\frac{1}{2}$ per cents. on the trusts of the deed.

The plaintiffs being in great pecuniary distress, the present bill was filed for the purpose of having the principal sum of £1000 paid to the plaintiffs, for the supply of their immediate wants. The plaintiff Julia offered to waive her equity to the said fund, and to permit the trustees to be discharged from the trusts. The bill prayed that the trustees might be directed by the decree of the Court, to transfer to the plaintiff Benjamin the amount of the trust fund, after payment thereof of his costs, and that they might be discharged from the trusts of the deed, and that the deed might be cancelled.

The trustees put in their answers, submitting to act under the directions of the Court.

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Mr. *Hughes* and Mr. *Keogh*, for the plaintiffs submitted, that the wife consenting to waive her equity in open Court, as there was no limitation to children, the husband was entitled to have the fund transferred. The parties are both advanced in years and in the greatest distress. In the case of *McCarmick v. Buller* (a), a sum of money was vested in trustees upon trust to pay the interest to the husband for life, after his death to the wife for life, and after the death of the survivor to pay the principal to such person as the survivor should appoint; a similar bill to the present was filed, and upon examination of the wife, the Court ordered the trustees to pay the money to the husband. The same principle was acted on in *Guisse v. Small* (b); and *Ellis v. Atkinson* (c).

Mr. *Warren*, for the trustees, cited *Stiffe v. Everitt* (d), where Lord Cottenham doubted the power of the husband to dispose of his wife's life interest, when not settled to her separate use.

Mr. *Hughes*.—The case of *Stiffe v. Everitt* cannot be relied on as an authority in the present case. It did not come before the Court in a proper form to raise the question, Lord Cottenham having said, that he made his decision in the absence of authority, and without any argument in support of the claim.

The cause stood over for further argument, the Lord Chancellor expressing himself anxious to make the decree if it could be done.

Mr. *Blake*, Q. C., on a subsequent day, was heard for the plaintiffs. The difficulty Lord Cottenham felt arose out of the case of *Purdew v. Jackson* (e), and *Honner v. Moreton* (f); the difficulty in those cases was, that there was a life-estate outstanding in a third person; but where the husband and wife have between them the whole right, there is no difficulty, *Ellis v. Atkinson*. A different principle guided the cases of *Sperling v. Rockfort* (g), and the others which are said to control the present case. In all those cases there was an outstanding life-estate in a third person. If there be a principle denying the right of the husband in cases like the present, it is a new one. Lord Cottenham has said that he knew of no cases establishing the contrary. Besides the more modern cases already cited, there is one decided by Lord Nottingham, *Brudnell v. Price* (h).

(a) 1 Cox. 357.

(c) 3 Bro. C. C. 565.

(e) 1 Russ. 1.

(g) 8 Ves. 140.

(b) 1 Anstr. 277.

(d) 1 My. & Cr. 37.

(f) 3 Russ. 65.

(h) Finch. Rep. 365.

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Mr. Warren, Q. C., for the trustees.—The cases cited by Mr. Blake have been overruled. They were discussed in *Richards v. Chambers* (a). There it was distinctly held that no jurisdiction existed in equity by the consent of a married woman upon examination to transfer to her husband personal property, settled in trust for her in the event of her surviving her husband. In *Wollands v. Croucher* (b), a doubt was raised, but it has been set at rest by the subsequent cases.

LORD CHANCELLOR.

I felt a great anxiety to give these parties a decree if I could. The woman almost fell on her knees to me to ask me to do it. The property is very small, and I would give to them if I could. Cases were cited to shew that the Courts had sometimes done so, but those cases are not sustained on looking more fully into the authorities. The case of *Stiffe v. Everitt* corroborates the doctrine adopted by Lord Lyndhurst and Sir Thomas Plumer. The judgment of Sir Thomas Plumer is very able and satisfactory. There was no Judge who ever took more pains. He left none of the authorities unexamined in *Purdon v. Jackson* (c). I think I must dismiss the bill, but I will consider it again, and if I should alter my opinion I will mention it on Wednesday.

On a subsequent day the LORD CHANCELLOR again mentioned the case, but remained of the same opinion, and the bill was dismissed. The trustees to have their costs out of the *corpus* of the fund.

(a) 10 Ves. 580.

(b) 12 Ves. 174.

(c) 1 Russ. 1.

Thursday, January 23d.

PRINCIPAL AND AGENT—MORTGAGOR AND
MORTGAGEE

BURROUGH v. CRANSTON.

CRANSTON v. BURROUGH.

FORECLOSURE suit by the executors of Sir Richard Burrough, to raise a mortgage debt of £2000. Cross-bill by Cranston, the mortgagor, insisting that he had paid off the mortgage, and got a receipt for the money from J. W. Barlow, the agent of Sir Richard Burrough.

Barlow had never paid the money to Sir R. Burrough, and the questions discussed at the hearing were:—

First, whether, in point of fact, Cranston had ever paid the money to J. W. Barlow, as alleged?

Secondly, supposing £2000 to have been really paid, whether it was paid to Barlow, as the *agent* of Sir Richard Burrough, in discharge of the mortgage debt?

Thirdly, supposing the money really paid, and paid to Barlow as the agent of Sir R. Burrough, whether a payment to the general agent of a mortgagee, is a good discharge of the mortgage debt?

Fourthly, whether the mortgagor in this case, having repaid the money to the agent *before the day* limited by the deed, could charge such a payment against the mortgagee, who had not received it nor authorised a premature re-payment?

By the mortgage deed, it appeared that the time limited for re-payment of the mortgage money was five years from the date, and after the five years had elapsed, the mortgagee was not to call it in without giving six months' notice; and, on the other hand, the mortgagor was not to pay it off without giving six months' notice. The payment was stated by Cranston, the mortgagor, to have taken place only two months after the original loan. He stated, that having originally raised the money for a particular purpose connected with some *office* for which he was negotiating, and being disappointed in his views, and no longer requiring the money, he applied to J. W. Barlow, informing him of the circumstance, and inquiring whether Sir R. Burrough would take back the money and give up the deed. To this application, according to Cranston's statement, Barlow replied that Sir R. Burrough was willing to do so. Cranston swore, in his answer, that he had accordingly paid the money to Barlow, and that Barlow had thereupon given up the title deeds of the mortgaged premises, and had also given him a receipt upon a piece of paper, which receipt Cranston stated that he had since unfortunately lost.

A payment of the mortgage money before the day limited by the deed, to the general agent of the mortgagee, but without the mortgagee having authorised a premature repayment, and without his privity, is not a good discharge of the mortgage debt.

Evidence was given to shew that Barlow was the general agent of

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Sir R. Burrough, and frequently lent and received money on his account. The title-deeds of the mortgaged premises had certainly been restored to Cranston, but not the mortgage deed. The latter was found after Barlow's death among his private papers, and not among the papers of Sir Richard Burrough.

Sergeant *Greene*, Mr. *Blackburne*, Q. C., Mr. *Keatinge*, Q. C., and Mr. *Webber*, for the executors of Sir R. Burrough, the mortgagee, submitted—

First—That there was no sufficient evidence of any such payment as that alleged by Cranston to have been made to Barlow, and that the mortgagor, if he alleged a payment, should prove it strictly.

Secondly—That supposing Barlow the general agent of Sir R. Burrough, that did not give him authority to give a discharge for a mortgage debt, for that requires a re-conveyance. *Whitlock v. Waltham* (a); *Martin v. Kingsley* (b); *Roberts v. Mathews* (c); *Curtis v. Drought* (d).

Thirdly—That even supposing Barlow to have been sufficiently an authorised agent to enable him to receive the money at the time limited by the deed, yet that he could not be held to have authority to rescind the original mortgage contract, and take back the money in two months, instead of five years, as provided by the deed; and that Cranston, by paying the agent in derogation of the contract with the principal, had made him his own agent. *Cambell v. Hassell* (e); *Kymer v. Suercroft* (f); *Blackburne v. Scholes* (g); *Parnter v. Gaitskell* (h).

Mr. *Pennfather*, Q. C., Mr. *Warren*, Q. C., Mr. *Gilmore*, Q. C., and Mr. *Wright*, for Cranston, the mortgagor.

Barlow is proved by the evidence to have had a general authority from Sir R. Burrough to transact his pecuniary concerns in this country, from the year 1833 until his death, and, therefore, had authority to bind his principal. *Whitehead v. Tulkett* (i). There is no such distinction as contended for between a mortgage and a bond. *Duchess of Cleveland v. Executors of Dashwood* (k).

LORD CHANCELLOR.

This is an important case, and it has taken time equal to its importance. Mr. Cranston is interested very much, if he have paid this sum, that he should not pay it now again; but, on the whole of the case, I do not entertain a doubt how my decision ought to be, and that

(a) 1 Salk. 157.

(c) 1 Vern. 150.

(e) 1 Stark. 233.

(g) 2 Camp. 341.

(i) 15 East, 400.

(b) Pre. Cha. 209.

(d) 1 Moll. 487.

(f) 1 Camp. 109.

(h) 13 East, 432.

(k) Freeman, 249.

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is in favor of the mortgagee. The mortgage deed has been proved, and by it, it appears that the money was not payable for five years, until 1st May, 1838; and even after five years, the mortgagor was not to call it in without six months' notice, and Cranston was not to pay it without six months' notice. It is said that Cranston was desirous to pay it off shortly after it was borrowed, that is, he was desirous to rescind the contract. He was seeking some office through this money, and being disappointed in his object, he pays it back into Barlow's hands, without communication with Sir Richard Burrough, and without any voucher except a receipt upon half a sheet of paper, there being no witness present. Now, that is not the usual mode of business, to say nothing of Cranston being a man of business himself. But where is this receipt? It is not produced. Cranston had it in his possession in February 1837; he has kept it so carefully that he has mentioned it in his letter to Hamilton as being in his possession, and now it is said to be lost. At that time he was perfectly aware of an adverse case against him, that a case had been laid before counsel with a view to sue him upon this mortgage, and he unaccountably loses this important document. The Court would stultify itself to credit this account on the evidence in these causes. I say nothing against Mr. Cranston. That he may have got this receipt I do not doubt, but I entertain a vehement suspicion that this document contains something which he might suppose would defeat his case. He has given no evidence how he made this payment, whether in gold or notes; he has produced no order, no banker's book; there is not mention of the matter to any one for the four years of Barlow's life; there is no communication with Sir Richard Burrough or Sir Edward Burrough, or any other person. I am not bound to decide that he has given an untrue account in his answer—I am not driven to that—but I should rather say, that the nature of the transaction was as Mr. Barlow has stated it in the declaration made to his wife, that it was paid to Barlow for the purpose of employing it. It may have been as Mr. Cranston has stated, but I go upon this, that the Court is bound to see that the party who relies on such a payment, under such extraordinary circumstances, makes actual proof of it. But even if the payment were made, I adopt the argument of the counsel for the plaintiffs in the original cause, that it could not be relied upon. As to the cases which have been cited, and the distinction taken by Mr. Cranston's counsel between general agency and a mere special authority, I agree with them that the distinction is clearly taken. I allude to the cases cited from 15 *East*. But what are these cases? They are not cases of dealing with land, but with goods and with brokers, persons particularly qualified, and filling that character. The broker is considered in some degree as owner; but, surely, these cases cannot apply to the case of a mortgage—a mortgage, too, not payable for five years—as to enable an agent to

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rescind such a contract as that. Lord Ellenborough and Mr. Justice Bayley put it upon this, that they considered the broker as owner, and that public policy requires it; but the case of a mortgagor is different. It was not necessary or incident to Barlow's character, as agent, to receive this money, but it was an actual rescinding of the contract. That there was no communication with Sir Richard Burrough—that Barlow was not dealing fairly with Cranston, is quite plain; that he was not dealing fairly with Sir R. Burrough is still more plain. His dying declaration and the evidence of Mrs. Barlow, shew that he got this money, and that he intended to account for it; but that declaration shews that the debt was not paid off. Evidence has been gone into to shew Barlow's general agency, and his receipt both of principal and interest. There is no very satisfactory evidence of the actual payment of this sum to Barlow on account of Sir R. Burrough, and the proof resorted to is the production of the accounts furnished to Bland; but these, as alleged by counsel, were not furnished as claims. The present plaintiffs' knowledge of the matter of the mortgage arises from the explanatory letters of Cranston himself. The accounts are no evidence of an intention to resort to Barlow's assets; nor, even if they were, would it bind the executors of Sir R. Burrough. There are many minor points in the case, which I omit. The conclusion is, supposing Barlow a general agent to receive the principal money, had Sir R. Burrough constituted him his agent for every purpose? Did he put himself and his property altogether in his power? I cannot bring myself to think so; but this part of the case it is not necessary to rely on, the entire circumstances throw such suspicion on the payment.

doctrine, but I thought it unnecessary to decide the point on which Sir Edward Sugden grounded his judgment. I thought that from an anxiety to decide the question as to a voluntary agreement, Sir Edward Sugden had overlooked a point in the case which was decisive between the parties, independent of any question of meritorious consideration. If I were to be called on to give judgment now, I think that the cases go the length of saying, that where a party claiming under a voluntary agreement seeks to clothe himself with the legal title, the Court will not compel the party who has received no consideration to convey the legal estate. But that is not what the party here applies for, and I think that this Court has a right to declare this fund liable to the trusts of this deed, supposing the deed to be genuine. But I do not think I can refuse an opportunity to the other party of trying the fact at law whether the deed was duly executed or not.

April 1840.

GANNON
v.
WHITE.

Tuesday, April 28th.

LORD CHANCELLOR.

It is true that the interest of Phipps in the lands, at the time he executed this voluntary deed, was only an equitable interest; and in order to obtain the benefit of it, Phipps himself, or his assignee, must come into a Court of Equity. But the conveyance to the trustees of the deed was a complete conveyance of that equitable interest. The case of *Blakeley v. Brady*, which was referred to in the argument, came before me after it had been argued before the Master of the Rolls, upon demurrer. His Honor sent me a note of his judgment, and when the case came before me, I made a full note of the authorities. The question raised there was as to the assignment of a *chose* in action. There is nothing to prevent a *chose* in action being effectually assigned in equity. The proof of that is, that if there is a valuable consideration, it will be sustained by this Court. In the present case, it was very roundly asserted in argument, without foundation, that no instance can be found in the books, of the Court having executed a voluntary instrument. The transaction being completed, so that the party is not to do anything more for the purpose of completing it, the Court will declare the rights of the persons in whose favor it is made. The bill is not framed here praying that a party may be compelled to transfer the fund, but it prays only a declaration of the rights of the parties, and to restrain any of the defendants from doing any acts inconsistent with those rights.

Thursday, May 7th.

SUIT BENEATH THE DIGNITY OF THE COURT.

LAMBERT v. LAMBERT.

A bill to restrain waste, the damage being only £7. 10s., is beneath the dignity of the Court, and will be dismissed, with costs, at the hearing.

SUIT to restrain waste. The bill stated the defendants to be tenants under the plaintiffs, by virtue of a lease dated in 1780, and that they had committed waste by cutting down timber.

The plaintiffs applied at the Rolls immediately after the bill was filed, and obtained an injunction until answer.

The plaintiffs then pressed for the answer. When it was filed, they moved to continue the injunction until the hearing, and the injunction was continued accordingly.

The cause now came on to be heard, and it appeared that very little timber had been cut, and of that the greater portion was timber planted and registered pursuant to the provisions of the Timber Acts, and which the defendants, therefore, had a right to cut. Consequently, the only trees to which the charge of waste applied were about half a dozen, the value of which was proved to be about £7. 10s.

Mr. Pennesfather, Q. C., Mr. Brewster, Q. C., and Mr. O'Dwyer, for the plaintiffs.

The bill was filed to prevent further mischief. It is true, the account of waste actually proved is small, but there is no saying the extent to which the injury to the estate might have been carried if we had not filed this bill.

Sergeant Greene and Mr. Blake, Q. C., for the defendant.

This suit is beneath the dignity of the Court, and, on that ground alone, the bill should be dismissed with costs. Even if it was excusable to file the bill, it was unnecessary to carry it to a hearing. They obtained an injunction on bill filed. That would have served every purpose, but they pressed for the defendant's answer, then moved to continue the injunction, and now have brought the suit to a hearing. The prayer of the bill is for an injunction and an *account* of the timber cut, and that the value of the timber so cut may be brought into Court and vested in trustees on the trusts of the plaintiff's marriage settlement; the sum to be so brought in and settled appearing to be £7. 10s.! This Court will not entertain a bill for so trifling a demand. *Creagh v.*

Nugent (a); *Brace v. Taylor* (b); *Jesus College v. Bloom* (c); *Whittingham v. Wooler* (d).^{*} May, 1840.

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Mr. *Brewster* replied.

LORD CHANCELLOR.

The plaintiffs may have their action of covenant at law without coming here, or they may have a civil bill if they please. It is like the case of *Brace v. Taylor*, before Lord Hardwicke. I must dismiss the bill, with costs.

(a) Moseley, 356; *ibid*, 47.

(b) 2 Alk. 253.

(c) 1 Ambler, 54.

(d) 2 Swans. 428.

^{*} And see *Disney v. Taaffe*, 1 Saussé & Sc. 105.

ROLLS.

Tuesday, January 21st, 1840.

AMENDED BILL—TAKING *PRO CONFESSO*—59TH
GENERAL ORDER (Nov. 1834).

KNOX v. KNOX.

Under the 59th general order (Nov. 1834), where the bill is amended after answer, the defendant having notice that his answer is required to the amendments, is not entitled to a notice to press for his answer.

MR. PAKENHAM for the plaintiff, moved that the bill might be taken *pro confesso* as against the defendant George Knox. The original bill had been amended on the 8th May 1839, and the defendant's copy was returned with the amendments, and with notice that his answer was required to them on the 24th of May 1839.

Mr. *Armstrong*, for the defendant, admitted service of the notice that defendant's answer was required to the amendments, but submitted, that the present application was irregular, as the defendant was not served with notice to press for his answer. The late Master of the Rolls decided in several cases, that where the bill is amended after answer, it cannot be taken as confessed against the defendant without a notice to press. The defendant's answer was in preparation and would be filed in a day or two.

Mr. *Pakenham* in reply said, that under the 59th Rule of November 1834,* the defendant was not entitled to a notice to press. He had three distinct intimations from the plaintiff that his answer would be required to the amendments: first, by distinct notice served with the amended copy of the bill; second, by the application to the Court, on notice in November last, for leave to amend without prejudice to process as against the said George Knox: third, by a subsequent application, also upon notice, to the Lord Chancellor to appoint a guardian *pendente lite*, for the minor defendant J. H. Knox, for the purpose of getting in the minor's answer.

* 59th General Order, November 1834, "That where a bill is amended after the appearance, and before an answer, plea or demurrer is filed, the defendant appearing shall be entitled to the same time to plead, answer, and demur thereto, as to the old bill; and where the bill is amended after demurrer, plea, answer, exceptions or objections, the defendant shall be entitled, without rule or order, to one month's time to demur or plead, and also to six weeks' time to answer the amended bill, and no longer, except by order on special motion; such periods respectfully to be reckoned from the return of the defendant's copy of the amended bill, or from the expiration of six days from notice to furnish defendant's copy for amendment, duly served, in case of default by defendant furnishing copy for amendment, or from the copy of the amended bill duly served, as the case may be."

THE MASTER OF THE ROLLS, referred to the Messrs. Darley and O'Keeffe as to the practice, and then said,—when notices are unnecessarily multiplied they tend only to confusion. I cannot see that there would have been any use of a notice to press, after the notice served on the defendant with the amended copy of the bill, requiring his answer to the amendments; and I am clearly of opinion, that by the 59th Rule a notice to press was not necessary. For the future I shall so decide; but as it appears that the practice as stated by the defendant was adopted by the late Master of the Rolls, and that the Officers of the Court were under the impression that a notice to press was necessary in cases of this kind, I must in the present case allow the defendant some further time for answering the amendments.

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ORDER :—Mr. *Armstrong*, of counsel for the said defendant George Knox, so desiring, let the said George Knox have a fortnight's further time to answer, upon the terms that if his answer be not then filed the bill shall be taken as confessed against him; and let the plaintiff's costs of this motion be costs in this cause.

Friday, January 24th.

COSTS—AMENDMENT OF BILL AFTER ANSWER.

WALSH and another, Executors of PATTERSON v. STUDDERT.

On a former day, Mr. *Warren*, Q. C., moved on behalf of the defendant Charles Studdert, that the plaintiffs should be ordered to pay to the defendant the costs of his answer filed on the 18th of May last, together with the costs of this application, before the defendant be required to answer the new pleading filed by the plaintiff in this cause; or for such other order, &c. No precedent for such a motion was shewn; and as his Honor, upon first impression, deemed that the question of costs thereby raised was one proper for the hearing of the cause, he refused the application, but in a few days afterwards was pleased to intimate that he had been thinking of the case, and was not satisfied with his first impression; and, therefore, desired Mr. *Warren* to renew

Where by amendment after answer, the plaintiffs made a different case, of which they were aware at the time of filing the original bill, and prayed relief on the new case, omitting the old prayer: upon motion for that purpose, the Court ordered the

plaintiffs to pay to the defendant £10, for the costs of so much of his answer to the original bill as would have been unnecessary if the plaintiffs had originally put forward their case as stated in the amended bill, in addition to the sum of 20s., late currency, payable on making the amendments.

Jan. 1840. the application upon notice to the plaintiffs. It was now renewed accordingly.

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The original bill was filed on the 5th of February, 1839, by the plaintiffs, as executors of Francis Patterson deceased, against the defendant Charles Studdert, who was the land-agent, receiver, and solicitor of the said F. P. from the year 1824, until his death, which happened in July 1831. The bill stated that "at the time of F. P.'s death there was an open and unsettled account between the defendant and F. P. of receipts and disbursements of the said rents; and that previous to, and at the time of the death of the said F. P., the defendant as such receiver, had in his hands in trust for F. P. a large sum of money, received by him on account of the said rents and profits, and particularly on account of the rents due out of the said lands and premises from the 25th of March and 1st of May 1829, to the 25th of March and 1st of May 1831, for which the said defendant had never accounted with, nor made any payment to the said F. P., nor accounted with the plaintiffs as executors of F. P. since his death." A case was made out to avoid the bar of the statute of limitations. The prayer of the bill was,—“That an account may be taken of the rents, issues and profits of the said lands, tenements, and premises received by the said defendant as the receiver and agent, and for the use of the said F. P. in his lifetime, since the time an account was last stated between the said F. P. and the said defendant; also an account of the payments and disbursements fairly made by and allowable to the said defendant out of the said rents and profits, as such receiver and agent,” &c.

The defendant filed his answer on the 18th of May 1839, admitting the will, &c., but putting in issue the several accounts annually stated and settled between the defendant and testator from the commencement of the receivership, and shewing payment to the testator of all balances of rents up to and for the 25th of March and 1st of May 1829. Further putting in issue an account for the two years from March and May 1829, to March and May 1831, stated and settled with the plaintiffs by the defendant, shortly after the testator's death, in which the defendant took credit for £300, alleged to be given to him by the testator. There was a long statement of the dealings and conduct of the parties, for the purpose of shewing that the plaintiffs and their co-residuary legatee had assented to, and acted upon, and had never objected to the last mentioned account, from the time when it was furnished until shortly before the filing of the bill. The defendant, therefore, insisted “he was not bound to enter into the account sought, by reason of the said several accounts between this defendant and the said testator, and his said executors respectively, and by reason of the acquiescence of the complainants and their said co-residuary legatee

"therein, and by reason of the length of time which has elapsed since the said accounts were so settled, and by reason of said complainants not specifying any items as objectionable therein.

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After the coming in of the foregoing answer, the plaintiffs, on the 28th of November 1839, amended their bill, by striking out nearly all the averments which were material as the case was originally framed, and by inserting instead, a statement of the account furnished by the defendant for the two years, from the 25th of March and 1st May 1829, to 25th March and 1st May 1831, and that it was assented to in ignorance;—seeking to surcharge and falsify it as a debit of £50, and the credit of £300 already mentioned, and, finally, omitting the original prayer, and praying instead, "that plaintiffs may be at liberty to surcharge and falsify the said account so furnished to them, more especially as regards the said items of £300, and £50, so claimed, as aforesaid, by the said Charles Studdert; and that in case your suppliants shall succeed in shewing errors in the said account in respect of the last mentioned items, that the said confederate may be decreed to pay," &c.

Mr. *Warren* submitted, that the plaintiffs had totally changed their case by their amended bill; that the case they now made was known to them before the filing of their original bill; that a large and troublesome portion of the defendant's answer would have been unnecessary, if the plaintiffs had originally shaped their case as at present; and that the rule respecting the plaintiffs' rights to vary the issue by amendment would be injurious and oppressive, unless the Court would give summary relief on motion in cases of this kind. He cited *Mavor v. Dry* (a). as an authority for the present application.

Mr. *Otoay*, for the plaintiff, submitted that *Mavor v. Dry* was distinguishable from the present case. There the plaintiff by his original bill sought to set aside a deed, and upon coming in of the answer, by way of amendment, made a case contradictory to that originally put forward, and seeking to establish the deed. There the question in fact was, whether a substitution so complete could at all be considered as an amendment; and accordingly the application was, that the original bill might be dismissed with costs, and the amended bill be ordered to stand as the original bill. That was an extreme case, not like the present, in which there can be no doubt that the amendments were allowable; *Dawson v. Dawson* (b); *Kinsman v. Barker* (c). This case, therefore, comes under the general and settled rule of the Court, by which a plaintiff is

(a) 2 Sim. & Stu. 113.

(b) 1 Atk. 1.

(c) 14 Ves. 579.

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entitled to amend his bill as he pleases, upon paying 20s. costs; *Taylor v. Shawe* (a); *Deggs v. Colebrooke* (b).

The case stood for consideration.

Saturday, January 25th.

The MASTER OF THE ROLLS, after stating the facts already mentioned, now delivered his judgment as follows:—

It is plain that a large portion of the defendant's answer would have been unnecessary if the plaintiffs had originally framed their case, and limited their prayer for relief, as they have done by their amended bill, and might have done originally. The statements in the amended bill are in some respects contradictory to the original statements, and the relief now sought is quite different from that originally prayed. The question I have to decide is, whether the defendant can now have, on motion, the costs to which he has been thus unnecessarily put, or whether the consideration of such relief must be postponed to the hearing of the cause? The counsel for the plaintiff insists, that by the settled rule of this Court, the plaintiff shall pay 20s. costs only on amending his bill; and, therefore, that the present application should be refused.

In *Deggs v. Colebrooke* (b), Lord Hardwicke is reported to have said, that he would not, in any one particular case, oblige a plaintiff to pay more than 20s. costs for an amendment after answer, "because it had been the constant rule of this Court, and established at first to prevent the inconvenience of entering too largely into the merits of the cause before the proper time for hearing the merits." But he adds, "that he would, notwithstanding, consider how to make a defendant some amends for being put to a great expense, by allowing him a more adequate compensation than only 20s. costs on the plaintiff's amending his bill after a long answer." In the later case of *Freke v. Culpepper* (c), under a fifth order for liberty to amend, upon payment of 20s. costs, the plaintiff made a very long amendment, requiring a new engrossment, and the defendant being under the necessity of taking out a copy of the bill as amended, moved to set aside the order; and there, Lord Hardwicke refused to discharge the order for liberty to amend, but ordered the plaintiff to pay to the defendant £7 for the costs occasioned by the fifth amendment, beyond the 20s. This latter case is clearly an authority for the present application, and shews that Lord Hardwicke did not consider the rule as to the plaintiff's right to amend, upon payment of 20s. costs, to be inflexible, and that he had considered "how to make a defendant some amends for being put to great expense." In *Masserene v. Lyndon* (d), it is said that the general rule, as to costs payable upon amendment of the

(a) 2 Sim. & Stu. 12, 14.

(b) 1 Atk. 396.

(c) Dick. 284.

(d) 2 Bro. Ch. C. 291.

bill is, that the plaintiff shall pay only *forty* shillings, and that a case of oppression must be shewn by the defendant, in order to induce the Court to depart from that rule. In the case now before the Court, the defendant's counsel does not dispute as to the general rule, but grounds his application upon this, that the plaintiffs being fully aware of the case on which they now rely, obliged the defendant to put in a long answer to a different case which they could not sustain; therefore, the present application appears to come within the principle of the exception stated in *Masserene v. Lyndon*. In the *Anonymous* case in 2 *Atkins' Reports* (a), where, after several previous orders, the plaintiff obtained a further order for leave to amend, and the defendant moved "that the plaintiff should not, under the last order, be at liberty "to amend, on payment of 20s. only," it appears that the motion would have been granted, but that the order had been obtained upon terms, and with the express consent of the defendant himself. In *Rennet v. Green* (b), the plaintiff having made several amendments on payment of 20s. costs, and having obtained a fourth order for the purpose, the defendant came in upon motion, and shewed that the several preceding amendments were frivolous, and merely vexatious repetitions of statements in the original bill; and the Court ordered him his taxed costs of the former amendments. In *Smith v. Smith* (c), which resembles the case now before the Court, the plaintiff, by his original bill, prayed an account against the defendant, as his bailiff or agent, as to a moiety of certain farms. Afterwards, an issue at law was directed to try whether the plaintiff was or not a mortgagee of the said moiety; and, upon the trial of that issue, the jury found that the plaintiff was such mortgagee. He then, under the common order, amended his bill, by stating the mortgage, and converting his former prayer of relief into a prayer of foreclosure; and afterwards filed a supplemental bill upon the said mortgage transaction, to which the defendant put in an answer. There, upon a motion on the part of the defendant, that it might be referred to the Master to tax the costs of the defendant up to the time of filing the plaintiff's supplemental bill, and that the plaintiff's amended bill might be taken off the file,—though it was insisted that the defendant by putting in an answer to the supplemental bill had waived all objection—Lord Eldon said, "I have no difficulty in saying that the defendant is "entitled to all the costs sustained by him beyond what he had been "put to if the bill had been originally a bill of foreclosure," and, therefore, made the order as to the costs, and it seems would have ordered the amended bill to be taken off the file, but that the cause was set down for hearing. *Mavor v. Dry* (d), is also a case similar to the present;

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(a) 2 Atk. 123.

(b) 1 Cox, 253.

(c) Coop. 141.

(d) 2 Sim. & Stu. 113.

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for it is to be remembered that the plaintiffs in the present case stated in their original bill, that at the time of the testator's death there was an open and unsettled account between him and the defendant, and that the defendant had a large sum of money in his hands, particularly on account of the rents from March and May 1829, to March and May 1831, for which he had never accounted with, nor made any payment to the testator, *nor accounted with the plaintiffs since the testator's death*; and so they prayed for an account of the rents, issues, and profits received by the defendant since the time an account was last stated between him and the testator. In answer to this bill, the defendant shews the several accounts stated and settled between him and the testator down to March and May 1829, and from thence to and for March and May 1831, an account furnished to the plaintiffs themselves, unobjected to by them, and adopted in the inventory and account of the testator's effects, which they furnished to the stamp-office and verified upon oath. Upon the coming in of this answer, the plaintiffs change the frame of their bill altogether; they set out the account for the last two years of the receivership furnished to them, and instead of the general account, they now seek only to surcharge and falsify this last account, and that the defendant may be decreed to pay the items surcharged and falsified with the admitted balance. It seems to me that the proceeding of the plaintiffs in the present case is scarcely less oppressive than the proceedings in *Smith v. Smith*, and *Mavor v. Dry*, and that Sir T. Plumer's observation in the latter case is as applicable to the present:—"The rule that the plaintiff shall pay twenty shillings costs only on amending his bill, does not bind the Court where there has been great oppression and vexation. This appears to me to be a case of that nature." In *Watts v. Manning* (a), Sir J. Leach adopted the same principle; and *Dent v. Wardle* (b), is, I think, also an authority for the present application.*

It is, no doubt, true, that there is much of the defendant's answer applicable to the bill as amended, but there is much of it that is not; and as the plaintiffs have made a *new case* by their amended bill, they might insist upon the defendant's answering all the interrogatories in the amended bill, though many of them were in the original bill, and already answered. In *Mazarredo v. Maitland* (c), after the defendant had answered, the plaintiff, by way of amendment, made a *new case*; but the amended bill contained several of the interrogatories which were in the original bill, and the question was—whether the defendant, in his answer to the amended bill, was bound to answer interro-

(a) 1 Sim. & Stu. 421.

(b) 1 Dick. 339.

(c) 3 Madd. 66, 72.

* See also *Bullock v. Perkins*, Dick. 110.

gatories which were in the original bill? Sir J. Leach said, "My opinion is, that the plaintiff having made a new case by the amended bill, the defendant is bound to answer all the interrogatories, though some of them are repetitions of the interrogatories in the original bill and have before been answered; because the further answer is made material by the new case."*

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Upon review of the several decisions I have mentioned, it appears to be now well settled, that if a plaintiff mis-states his case in the original bill, and by way of amendment after answer, makes the case which he should have made at first, and abandons altogether, or in part, the grounds which he has obliged the defendant to be at the trouble and expense of defending, the Court will give summary relief on motion, and order the plaintiff to pay the costs which he unnecessarily imposed on the defendant; and, I think, I should not be doing justice if I refused to make such an order in the present case. However, I will not direct a reference to tax the costs, as I wish to avoid as much as possible the expense and delay which references occasion; but following Lord Hardwicke's example in *Freke v. Culpepper*, I will at once fix the sum which the plaintiffs shall pay to the defendant, with the costs of this motion.

ORDER;—It appearing to the Court that the plaintiffs, by the amendments now made in the bill, have stated a case different from the case stated in the original bill, which new case was known to them when the original bill was filed; and that they have prayed relief founded on such new case, the Court doth order that the plaintiffs do pay to the defendant Charles Studdert £10 for the costs of so much of his answer filed on the 18th of May 1839, to the said original bill, as had reference to the case stated in said original bill, and would not have been necessary if the bill had been originally framed as it now is, in addition to the sum of twenty shillings late currency, payable on making the said amendments on the 28th of November 1839; and let the plaintiffs also pay to the said defendant £5 for his costs of this motion.

* See also *Ellice v. Goodson*, 3 My. & Gr. 660.

Monday, January 27th.

93D RULE—COSTS—PLAINTIFF INSOLVENT.

NUGENT v. PALMER.

Bill dismissed for want of prosecution, without costs, plaintiff being an insolvent.

MR. SCOTT, Q. C., for the defendant, moved that the plaintiff's bill be dismissed, with costs, for want of prosecution.

Mr. Keogh, for the plaintiff, stated that since the defendant had answered, the suit was abated, by the discharge of the plaintiff as an insolvent debtor.

MASTER OF THE ROLLS.

It appearing to the Court, that since the coming in of the defendant's answer, the plaintiff has been discharged as an insolvent debtor—Let the assignee of the insolvent file a supplemental bill within ten days, or, in default thereof, let the bill be dismissed, without costs. I cannot give costs against an insolvent.

Thursday, January 16th.

**PLEADING—CAUSES OF DEMURRER—51ST AND 52D
GENERAL ORDERS (Nov. 1834).**

**The Earl of MOUNTNORRIS and others v. Sir GEORGE RALPH
FETHERSTON.**

To an amended bill (filed after answer) stating certain matters, some of which appeared to be prior, and others subsequent to the filing of the original bill, but not re-stating the plaintiff's whole case as he intended it to appear on the record, the defendant demurred specially, upon the grounds that it was in violation of the 51st and 52d General Orders (Nov. 1834), and the demurrer was allowed.

AFTER answer, and before issue joined, the plaintiffs filed a further bill in this cause, shewing that they had exhibited their original bill on the 16th of August, 1838, "thereby stating and setting forth as therein is "stated and set forth, and praying as therein is prayed," and (without further recital of, or reference to the original bill) setting forth certain letters and notices, some of which were thereby stated to have been prior, and others—viz., notices in the cause which had passed through the Notice Office in the regular way—were in like manner stated to have been subsequent to the filing of the original bill. The intention of this new pleading clearly was to put in issue the documents just mentioned, for the sole purpose of fixing the defendant with the costs of the

demurred specially, upon the grounds that it was in violation of the 51st and 52d General Orders (Nov. 1834), and the demurrer was allowed.

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suit; and its prayer was merely that the defendant should bring in for inspection certain deeds admitted by his answer to be in his possession. To this bill the defendant demurred, for the following causes:—First, “That by one of the General Orders of this Honorable Court, it is amongst other things ordered, that where matters occurring before the bill filed cannot be introduced by interlineation plain and legible, a new engrossment of the old bill shall be filed, and such engrossment shall re-state the whole case of the plaintiff, as he intends the same shall at the time of amendment stand upon the record, including such further facts as have occurred before replication up to the time of filing such amended bill;*” and that although the said amended bill contains matters in the said amended bill appearing to have occurred before the original bill filed, viz.”—(several of such matters were here shortly stated)—“yet that the said amended bill does not re-state the whole case of the plaintiffs as they intended the same should at the time of amendment stand upon the record, including such further facts as had occurred before replication up to the filing of said amended bill, but on the contrary refers to the original bill.” Secondly, “That by one of the General orders of this Honorable Court, it is amongst other things ordered, that all new matter occurring subsequent to the filing of the old bill should be stated by a new bill, confined exclusively to such new matter, and that such new bill should not re-state any of the matters or charges contained in the old bill;† and that although the said amended bill does state new matter in the amended bill appearing to have occurred subsequent to the filing of the original bill, viz.”—(some of them were here shortly stated)—“yet that the said amended bill is not confined exclusively to such new matter, but states matters appearing by said amended bill to have occurred before the filing of the said original bill, viz.”—(some of them were here shortly stated). Thirdly—That the plaintiffs had not by their amended bill stated any case entitling them to discovery, &c.

Mr. *Sproule*, for the demurrer, submitted, that where a pleading is contrary to the practice of the Court, as settled by General Orders, such irregularity is good ground of demurrer. If the mode of proceeding for the party who has to complain of such irregularity is prescribed by the General Orders, as in the cases of prolixity, impertinence, and scandal, there the proceeding should be as prescribed by the General Order; but in the absence of such direction, as in the present case, the proper course is to demur. *Mitf. Pl.* 143; *Metcalf v. Harvey* (a); *Mitf.*

* 51st General Order (Nov. 1834).

† 52d General Order (Nov. 1834).

(a) 1 Ves. sen. 248.

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Pl. 54; Coop. Eq. Pl. 208; Rootham v. Dawson (a); Hook v. Dorman (b); Mitf. Pl. 202; Milner v. Lord Harewood (c); precedent of demurrer in 2 Van Heyth. Eq. Defts. n. 93; Mitf. Pl. 48; Kirkley v. Burton (d); Morris v. Morris (e).

Mr. *J. Hardey*, with whom was Mr. *Wm. Brooke*, Q. C., for the plaintiff, submitted that this bill was within the meaning of the 52d General Order, as the matters appearing to have occurred prior to the institution of this suit were stated only as introductory to the statement of the new matters, viz., the notices which passed between the parties after the filing of the original bill. But if this new bill be liable to the objections taken to it, the defendants' proper course should have been by motion to take it off the file for irregularity, and not by demurrer. *Peed v. Cussen (f).*

MASTER OF THE ROLLS.

I find that in the Rolls' Office this has been treated as an amended bill. The plaintiffs' counsel insist that it is a new bill under the 52d Rule. In my opinion, it is not properly either. It is a new engrossment, stating several matters, some of which appear to have occurred long before, and others after the filing of the original bill; but it does not state the whole case of the plaintiffs as they intended it should appear upon the record, and therefore it does not come under the 51st of the General Orders, which regulates the amendment of original bills by way of new engrossment. Neither can it be considered as a new or supplemental bill within the meaning of the 52d of the General Orders; because it is not confined exclusively to the new matter which arose after the filing of the original bill, but states old and new matter, having no necessary connexion, and independent of each other.

It is, I think, well settled as a general proposition, that where a pleading is contrary to the settled practice of the Court, the opposite party may either demur, or move that it be taken off the file for irregularity. The very recent decision of Lord Cottenham, in the case of *The Attorney-General v. Cooper (g)* would have been an authority for the defendant in the present case, if he had adopted the latter course; but I am of opinion that the cases which have been cited sustain the demurrer, and I am the more disposed to allow it for example sake, because bills of this kind, if permitted, would be most inconvenient and mischievous. It is, no doubt, very allowable and proper for a party to

(a) 3 Anstr. 859.

(c) 17 Ves. 144.

(e) 1 Hog. 378.

(b) 1 Sim. & Stu. 227.

(d) 5 Madd. 378.

(f) Saurse & Scully.

(g) 3 My. & Cr. 260.

to construct his case or conduct his defence, that his opponent shall be equitably liable for the costs of it; but to file a new pleading, having regard not to the cause of suit, but to the question "who is to pay the costs of it"—stating exclusively a few short letters and notices, which might have been introduced by interlineation into the original bill, so far as it was at all necessary to put them in issue—is to adopt a mode of proceeding which a Court of Equity ought not to sanction or tolerate. I doubt that it was at all necessary to put in issue in the pleadings notices in the cause served through the Notice Office; and I could not, without much argument and very clear authorities, be induced to sanction such a practice. Upon the question of costs at the hearing of the cause, it is usual to read and rely upon such notices, though not regularly in issue; and I have never known of any objection being made to so doing. But even supposing that at the hearing, the plaintiffs could not have relied upon those notices unless they were regularly in issue, still, for the reasons already mentioned, I am of opinion that this bill is altogether irregular, and that the demurrer must be allowed.*

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* See next case.

Saturday, April 25th.

PLEADING—DEMURRER—SUPPLEMENTAL BILL.

JOHN RICHARDS and ELIZABETH his Wife v. JOHN PAGE, WILLIAM LEWIS and MARY LEWIS.

DEMURRER by the defendants John Page and William Lewis, to a bill filed as a supplemental bill after issue joined, and before the hearing. The original bill was filed on the 20th December 1838, by plaintiff John, claiming (in right of his wife, as administratrix with the will annexed, of one Margaret Page) an account of assets of Margaret, alleged to have come to the hands of the defendant John Page as executor in his own wrong; and claiming (in right of the plaintiff Elizabeth), the amount of a legacy bequeathed to her by the will of John Page the elder, of which payment was prayed as against the defendants William Lewis and Mary Lewis, as executors of one George Lewis, to whom the plaintiffs insisted funds had been given by Margaret Page as the executor of John Page the elder, for the express purpose of paying this legacy. The defendants filed separate answers, the last on the 8th May 1839; and thereby, amongst other things, insisted that the plaintiffs were not entitled to a discovery of certain matters, on the

It is irregular to introduce in a supplemental bill filed after issue joined and before hearing charges contained in the original bill. Demurrer on that ground allowed.

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ground that the personal representative of John Page the elder was not a party. In November 1839, the defendants having applied to dismiss the bill for want of prosecution, the plaintiffs were put under terms to file a replication within two days, and it was accordingly filed. On the 10th of February 1840, the plaintiffs filed a bill purporting to be a supplemental bill, re-stating the principal charges of the original bill with alterations and considerable additions,—prefacing such statements by “your suppliants shew that by said bill they charged as “they now charge,” &c., “your suppliants by their said original bill “charged but erroneously,” &c.;—and charging as the only fact occurring after replication, that the plaintiff Elizabeth had in January 1840 obtained letters of administration with the will annexed of John Page the elder; and praying that this be deemed a supplemental bill, and that the plaintiffs might have the relief prayed by the original bill; also an account of the personal estate of the testator John Page, and of his debts, &c.; and that the rights of the plaintiffs under both wills might be declared. To this bill a demurrer was taken by the defendants John Page and William Lewis, assigning as causes,—first, “That “no new matter is shewn to have arisen since issue joined, which might “not (if the Court should think proper and necessary) have been stated “by amendment;”—second, “that the matters purporting to be new “matter, might in a proper stage of the original cause, have been the “subject of amendment” (a);—third, “that the supplemental bill seeks “to make a new and different case, not properly supplemental” (b);—fourth, “that the supplemental bill is not confined exclusively to new “matter occurring subsequent to the filing of the original bill, but re- “states various matters and charges in the original bill, and is con- “trary to the General Order No. 52, bearing date the 29th day of “November 1834;”—fifth, “that the supplemental bill states various “matters which appear to have occurred before replication, and is not “confined exclusively to new matter occurring after replication;”—sixth, “that the bill is exhibited against the defendants for several dis- “tinct and independent matters and causes, which have no relation to “each other, and which should not be joined in one bill.”

Mr. *William Smith* for the demurrer was stopped by the Court. His Honor said he would hear the plaintiffs’ counsel as to the 4th and 5th causes of demurrer. As to which Mr. *Smith* mentioned the following authorities:—*General Order*, 52; *Lord Redesdale’s Treatise*, 206, (4th

(a) See *Milner v. Lord Harewood*, 17 Ves. 144.

(b) See *Colclough v. Evans*, 4 Sim. 76, and *Nagle v. Bateman*, *Crawf. & Dix*.

edition); *Onge v. Truelock* (a); *Young v. Keighly* (b); *Kirkley v. Burton* (c); *Metcalf v. Harvey* (d). April 1840.

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Mr. *Wm. Gibbon*, with whom was Mr. *Dickson*, Q. C., for the plaintiffs.—They cited *Brown v. Higden* (e).

THE MASTER OF THE ROLLS, after stating the charges and prayer of the supplemental bill, said—

To this bill several causes of demurrer have been assigned, but I shall at present advert particularly only to the fourth and fifth, which are in substance, that this supplemental bill is contrary to the 52d General Order, and to the established rules of equity pleading.

It has been decided in a variety of cases, that if a bill is framed in contravention of the settled practice of the Court, the defendant may upon that ground either move to take it off the file, or demur. The 52d General Order declares that the new—i. e. supplemental—bill “shall not re-state the matters and charges contained in the old bill;” but here we have a re-statement of nearly the whole of the original bill, and for the most part without any alteration. Again, it is a rule in pleading, that if a plaintiff puts forward, by way of supplemental bill, matter with which the original might properly have been amended, such supplemental bill is vicious, and the defendant may demur. Now, the 51st of the General Orders ascertains the proper subject-matter for the amendment of the original bill to be not only “matter occurring before the bill filed,” but also “such further facts as have occurred before replication up to the time of such amended bill.”* The only

(a) 2 Molloy, 39.

(b) 16 Ves. 348.

(c) 5 Madd. R. 378.

(d) 1 Ves. sen. 248; 2 Dow. Ch. Pr. 65.

(e) 1. Atk. 291.

* Under the old practice in this Court and in the Court of Exchequer, such a Rule as the 52d General Order of November 1834, might be understood as applying exclusively to bills of amendment. But considering the 51st and 52d General Orders of November 1834, in this Court, as sections of the same general canon of practice, it seems impossible to discover the propriety or meaning of the latter. It is demonstrable, and has already been decided by his Honor in *Raymond v. Evans*, ante, vol 1, p. 428, that the 52d Rule is exclusively applicable to supplemental bills. The 51st Rule requires that when the plaintiff amends by a new engrossment, he shall re-state his whole case, as he intends it at the time of amendment to appear upon the record: therefore, a new engrossment which does not re-state the plaintiff's whole case as he intends it to appear upon the record, but is confined exclusively to matters occurring after the filing of the bill, must be a supplemental and not an amended bill. From thence arises a very serious inconsistency between the 51st and 52d Rules, viz:—that the 51st Rule defines to be matter of *amendment* that which the 52d declares to be *supplemental* matter; and thereby a very important rule of pleading is sacrificed between them. Even if the 51st Rule had continued as it was originally framed, the difficulty as to the meaning of the 52d could have been scarcely less than it is at present; but the amendment of the 51st Rule (by the insertion of the clause in italics) which rendered it clear and complete, also rendered it inconsistent with the 52d; and it seems plain that it must have been by an oversight that the

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costs ; or if an application had been made by the plaintiffs for liberty to dismiss their bill, upon payment to the defendant of the costs of a disclaimer, I might have acceded to it, as I did in a recent case upon a similar application.* But as, upon the present motion, it does not appear that the plaintiff's case is within any of the exceptions mentioned in the 93d Rule, I must make the common order, that this bill be dismissed, with costs.

* See *Plumtre v. Walsh*, 1 Ir. Eq. R. 142.

Tuesday, February 4th.

POSSESSORY BILL—PRACTICE.

FRANCIS M. BIDDULPH v. ARTHUR MOLLOY.

On application for an injunction in a possessory suit, a conditional order for *both* injunctions to issue, will be granted.

MR. WM. SMITH, on behalf of the plaintiff, moved for an injunction, directed to the defendant, and all persons acting under him, to restore to plaintiff the possession of that part of the lands of Rathrobin mentioned in the bill, with the appurtenances, belonging to plaintiff, and, from time to time to quiet him, and those deriving under him in such actual possession, until the plaintiff should be evicted by due course of law ; and in default of his so doing, that an injunction might issue, directed to the Sheriff of the King's County, requiring him to restore the plaintiff, and from time to time to quiet him and those deriving under him in the actual, quiet, and peaceable possession of said lands and premises. The bill, as verified by the plaintiff's affidavit stated, that the plaintiff having been for five years and upwards, then last past, seized, under and by virtue of a lease for lives still subsisting and renewable for ever, of and in the lands of Rathrobin, in the King's County, part of said lands were held by the defendant, as tenant to the plaintiff, under a lease for the term of two lives, of which the life of the defendant only was then subsisting, at a certain yearly rent, payable to the plaintiff by the defendant ; and that the defendant having suffered the yearly rent so payable to plaintiff to run in arrear, the plaintiff, as of Michaelmas Term, 1838, brought his ejectment for non-payment of rent, to which the defendant took defence, but afterwards gave a consent for judgment, upon which the plaintiff obtained judgment as of Easter Term, 1839, and on the 8th of May last issued an *habere* directed to the sheriff of the King's County, which was executed, and possession delivered to the plaintiff on the 29th of the same month. That no part of the rent, for the non-pay-

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ment of which the ejectment was brought, had been since paid. That the plaintiff having obtained such possession, and the time for redemption having expired, the defendant, on the 30th of December last, *fraudulently and by force*, took possession of the said lands of Rathrobin, containing 65 acres, with the appurtenances; and the defendant and his assistants or servants had ever since, fraudulently and by force kept, and still detained the possession of the said lands, without any manner of title, and refused to deliver up the same, although he had not any manner of right thereto. That the plaintiff, by the said defendant, as his tenant (until the eviction of the lease made to the defendant,) and by receipt of the rents of said lands, as aforesaid, had been and continued in possession and enjoyment of the said lands and premises for upwards of five years then last past, and until the time when the said defendant so forcibly and unlawfully entered into and took such possession as aforesaid. The bill then prayed an injunction to the party and to the sheriff, in the terms of the application.—[The MASTER OF THE ROLLS inquired if the affidavit negatived the existence of any new contract?—Counsel answered that it did not in terms, but it stated that the defendant had forcibly and unlawfully taken possession, without any manner of title or right. The existence of any new contract would be inconsistent with this averment, and need not be negatived being properly matter of defence, as in the case of *Chartres v. Sherrock*,* decided in this Court in the year 1831, which was strongly litigated, and proceeded to a hearing.

His HONOR said he recollected being counsel in that case. That he found the old practice of issuing the injunction to the party absolutely in the first instance, was inconvenient, and preferred granting a conditional order to issue both injunctions. He also observed that this course of proceeding ought not to be resorted to, unless in clear cases of overholding or forcible possession, and made the following order:—

Let an injunction issue, directed to the said defendant Arthur Molloy, requiring and commanding him, and all persons acting under him, to give and restore to the plaintiff Francis M. Bidulph, the actual, quiet, and peaceable possession of that part of the said lands of Rathrobin, containing 65 acres, late Irish plantation measure, be the same more or less, with the appurtenances, situate, &c., the same to continue until the said plaintiff shall be thereout evicted by due course of law, and the further order of the Court to the contrary; and in default of said

* See full note of this case, *post*, 230.

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defendant so doing, that an injunction do issue, directed to the sheriff of the King's County, commanding him to give and restore to the said plaintiff the actual, quiet, and peaceable possession of the said lands and premises, with their appurtenances, the same to continue until the plaintiff shall be thereout evicted by due course of law, and the further order to the contrary, unless in four * days after service of this order on the said defendant Arthur Molloy, and on all persons in possession of said lands and premises, good cause be shown to the contrary. And let the plaintiff be at liberty, at any time during the present Sittings, to apply to the Court to make this order absolute.

* This short period was fixed in consequence of the Sittings being near a close, his Honor observing, that considering the present expeditious system of communication, four days now afforded as much opportunity to make a defence as eight days did formerly. The defendant, on a subsequent day, shewed cause by affidavit, wherein he deposed that an agreement had been entered into between the plaintiff and defendant, for a redemption of the lands, by which the plaintiff was to take a bill for the rent due, and costs, and which bill, the defendant stated, the plaintiff had accepted. The cause shewn was allowed, with costs. The defendant was ordered to appear forthwith, to enable the plaintiff, who controverted the matter in avoidance, to proceed in the cause.

The Reporter is indebted to Mr. W. Smith for the following note of the case Sherrock v. Chartres, and the subjoined note respecting the practice on Possessory Bills:—

ROLLS, 1831.

POSSESSORY SUIT—OVERHOLDING TENANT—PRACTICE—READING PART OF A DEFENDANT'S ANSWER TO PERSONAL INTERROGATORIES.

JOHN CONNELL SHERROCK and ELLEN his wife v. GEORGE CHARTRES.

Course of proceeding in possessory suits. A plaintiff may read part of defendant's answer to a personal interrogatory.

The bill in this cause was filed the 4th of March, 1831, and stated that the plaintiff Ellen being possessed in her own right, and to her sole and separate use for a long term of years, still subsisting, of a certain dwelling-house and premises with the appurtenances, situate in Grenville-street, in the parish of Saint George, and county of Dublin, known by No. 7, together with the household furniture, then and therein being, on the 12th day of February, 1828, by and with the consent of the plaintiff John, in consideration of the yearly rent hereinafter mentioned, demised the said dwelling-house

and premises with the appurtenances, furnished, as the same then was, and still continued, to the defendant George Chartres, for the term of three years from said 12th of February, 1828, at the yearly rent of £105 sterling, payable quarterly in advance, on every 12th day of June, August, November and February during said term, the first payment in advance having been made on the 12th of February, 1828, as appeared by a letter or proposal signed by the defendant referred to by the bill. That by virtue of said demise, the said George Chartres went into possession of said dwelling-house and

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premises, with the appurtenances, furnished, as aforesaid, and paid the rent so reserved by the said demise to the plaintiff Ellen, or to the plaintiff by her directions and authority, except the gale of rent which accrued for the quarter ending on the 12th of February last, which had not been paid,—and that on the 12th of February last, the demise so made by the plaintiff Ellen of said dwelling-house, premises, and furniture, for the said term of three years from the 12th of February, 1828, expired. That the plaintiff Ellen by the said George Chartres as her tenant, and by receipt of the rent so reserved, as aforesaid, had been, and continued in possession and enjoyment of said dwelling-house, premises and furniture, as the separate estate and property of the plaintiff Ellen, for upwards of seven years last past. That said demise having so expired, the plaintiff on the 12th of February last, and also on the 19th day of February last, demanded the quiet and peaceable possession of said dwelling-house and premises, furnished, as aforesaid; but plaintiffs were refused such possession by the wife and by the servant of the defendant, by his directions and on his behalf,—and the defendant and his assistants had fraudulently, and by force, and unlawfully kept, and still detained the possession of said dwelling-house and premises, furnished as aforesaid, with the appurtenances, from the plaintiff Ellen. That the defendant, combining and confederating to and with divers persons unknown to the plaintiffs, and those persons employed by him, by fraud and force and violence withheld, and ever since

the 12th of February last detained the possession of the said dwelling-house premises and furniture, with the appurtenances, without any manner of title, and refused to deliver up the same, though he had no manner of right thereto.* The bill then prayed for a writ of injunction directed to the defendant, his confederates and assistants, requiring them and all persons deriving or acting under him or them, to restore the possession of the said dwelling-house and premises, with the furniture and appurtenances thereunto belonging, and so demised therewith unto the plaintiff Ellen, to, and from time to time, to quiet her and all those deriving under her in the actual quiet and peaceable possession of the said dwelling-house and premises, with the appurtenances aforesaid, until the plaintiff Ellen should be evicted by due course of law: and in default of their so doing to grant unto the plaintiff a writ of injunction directed to the sheriff of the county of Dublin, requiring him to restore the plaintiff Ellen to, and from time to time to quiet her and those deriving under her, as aforesaid, in the actual quiet and peaceable possession of said dwelling-house and premises, together with the furniture, and appurtenances aforesaid, and that the defendant might stand to and abide such further order in and concerning the premises, &c.

Upon the 5th of March, 1831, an *absolute* order for an injunction, directed to the defendant, to deliver up possession as prayed, was granted on motion of course. The defendant having been served in Dublin with the injunction, caused an appearance, as on an attachment, to be entered thereto

* The bill contained no further statement. In bills of this description it is not the practice to insert interrogatories, or to pray *subpena* to answer. The possession and the disturbance or overholding are the only matters to be determined in a proceeding of this nature. See *note* post.

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within *six* days after service; whereupon the plaintiffs within *four* days exhibited personal interrogatories* for the examination of the defendant, founded on the charges in the bill, to which the defendant filed his answer* on the 18th of March, 1831, and thereby admitted the demise, the letter or proposal, the possession and payment of rent, as in bill mentioned, and denied that he fraudulently or unlawfully held the possession of the said dwelling-house, premises and furniture, alleging that in the month of October, 1829, the plaintiff John, on behalf of the plaintiff Killen, proposed to, and promised defendant that he should keep the said dwelling-house and premises for three years from that time, should he be desirous so to do, which proposal and promise were so made by the plaintiff John, as defendant recollected and believed, in the hearing of a female servant who then lived in the defendant's service, and whose name, as defendant best recollected, was Anne Hudson; and although defendant was not at the time very anxious to continue in the occupation of said house and premises, yet defendant, upon the faith of such proposal and agreement, and of having such renewed and continued term, went to considerable expense in bringing into, and depositing in said house and premises great quantities of wine, the defendant carrying on the wine trade, and submitted that the said term which the plaintiff John so proposed and promised to give the defendant must be considered as a continuation of the said original term of three years, and as a continuation of defendant's possession under the first agreement, and that the term was still continuing. Exceptions having been filed to this answer and allowed, the defendant on the 29th April, 1831, filed a further

answer. On the 30th April, 1831, the plaintiff served notice on the defendant, stating that the plaintiff would proceed to prove his case, *but not in terms requiring the defendant to prove the matters of avoidance alleged in his answer to personal interrogatories.* The plaintiff examined a witness who proved a demand of possession on the premises on the 19th of March, 1831, and a refusal *by the defendant's wife.*

On the 7th of June, 1831, the plaintiffs entered and served a rule to pass publication, at the end of a week, when publication passed, and the cause having been set down to be heard on pleadings and proofs at the Rolls, came on to be heard there on the 25th June, 1831.

For the plaintiffs, *Richards, Q. C., T. B. C. Smith, Q. C., and G. W. Creighton.* For the defendant, *O'Loghlen, Sergeant, Greene, Q. C., and Dunne.* An objection was raised by the defendant's counsel that the notice served by the plaintiffs was insufficient to join issue, insisting that it should have called upon the defendant to proceed and prove the matters in avoidance alleged in his answer to personal interrogatories.

Sir WILLIAM M'MAHON, M. R. made the following order:—

“Let this cause stand over for three weeks, and let the plaintiffs (they so undertaking by Mr. *Smith* as their counsel in open Court), be at liberty to serve a notice within two days from this date, calling on the defendant to prove the matters of avoidance of the plaintiffs' claims as set forth in the said defendant's answer to said personal interrogatories, and let the defendant thereupon be at liberty to proceed to prove the said matters; and the plaintiff so consenting, in case it shall be necessary for the defendant to issue a commission

* Filed in the Office of one of the Examiners in chief.

for the examination of witnesses, let the plaintiff accept of four days' notice of speeding such commission and four days' notice of witnesses' names; and in default of the defendant proceeding to make such proofs within the said time, let the plaintiffs beat liberty to proceed with the hearing of this cause, as they may be advised, and let the plaintiffs pay the defendant the costs of the day."

The defendant examined witnesses but failed to prove any material fact.

On the 23d July, 1831, the case came on for further hearing, and was further heard on the 30th July, 1831. For the plaintiffs, counsel read the defendant's answer to the second interrogatory, admitting the terms of the agreement as stated in bill, and the deposition of a witness who proved a demand of possession on the premises on the 19th February, 1831, and a refusal by the defendant's wife;* and then read the following portion of the defendant's answer to the fifth personal interrogatory, to shew a demand of possession, and refusal by the defendant's authority to deliver up same, "Saith he admits " that the said term for three years " for which in said letter of the " 12th day of February, 1828, he " proposed to take said dwelling- " house and premises and furniture, " under or by virtue of which, and " said demise so made as in defend- " ant's answer to said second in- " terrogatory above stated, this " defendant was originally to hold " and enjoy the said house, pre- " mises, and furniture, save and ex- " cept as hereinafter stated, did end " and determine on the 12th day " of February, 1831; and that " plaintiffs did on the two several

" days in that behalf mentioned, " demand and require the posses- " sion of said dwelling house, pre- " mises and furniture, and from " the defendant's wife, and that " such possession was refused by " the directions and with the as- " sent and privity of defendant."

Mr. *Greene* for the defendant, required the entire of the defendant's answer to the fifth interrogatory to be read and submitted, that the whole of, or so much of the answer to this interrogatory as related to the refusal to give up possession of the premises should be read and considered as part of the plaintiffs' case, inasmuch as the plaintiffs' counsel required a part thereof to be read.

Mr. *Richards* for plaintiffs submitted that the plaintiffs were entitled to read a part of said answer, and not the remainder, as they might think fit, and that the plaintiffs only read so far as necessary to shew a demand and refusal of possession.

The remainder of the defendant's answer to the fifth interrogatory was read at the defendant's instance, which stated that although he admitted that he kept and detained such possession, yet he denied that he fraudulently or unlawfully held the possession, for that in the month of October 1829, the plaintiff John, &c.†

His Honor ruled that the defendant was bound to prove the matter of avoidance in the answer to this interrogatory, and was required so to do by the plaintiffs' notice, bearing date the 27th day of June, 1831, and pronounced the following decree.

" Let the said defendant George Chartres be adjudged in contempt, and let an injunc-

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* The remainder of this note is extracted verbatim from the Registrar's minutes as entered in the hearing book, save that the portions of the answer therein described are here given in *thee* *verbo*.

† The substance of the answer has been stated, *ant.*.

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tion issue directed to the sheriff of the county of Dublin, commanding him to restore the plaintiff Ellen Sherrock to the quiet and peaceable possession of the said dwelling-house and premises and the furniture belonging thereto, and formerly demised therewith, for a term now expired, to the defendant, as her separate estate, and from time to time to quiet her and those deriving under her in the actual quiet and peaceable possession of the said dwelling-house and premises in the pleadings in this cause

mentioned, together with the furniture and appurtenances belonging thereto, and formerly demised therewith for a term now expired, in the pleadings mentioned; and let the said defendant pay the plaintiffs the costs of this cause, and refer it to the Master to tax the same, and accordingly let the plaintiff be at liberty to make up a decree with costs against the said defendant, for the performance whereof the process is from time to time to issue as in such cases usual."

NOTE.—The proceeding by Possessory Bill to recover possession of land, in a great measure peculiar to Ireland, should be resorted to only in *clear* cases of overhelling as between landlord and tenant, or of forcible possession. "Upon these bills, generally speaking, unless the dispute be between landlord and tenant, there is nothing before the Court but the three years' possession, the title is not in the case, and the single question is, whether the plaintiff, or those under whom he derives, have been in the quiet enjoyment of the matters in dispute for three years last past before the time of filing the bill? No subpoena is to issue on this bill, nor is any process to be prayed therein, save an injunction to restore the possession. The bill itself is never answered, being only filed as a foundation for the jurisdiction of the Court."—*Hew. Ch. P.* 42. It should consist of a brief statement of the facts, and conclude with a prayer for an injunction to the party, which is in the nature of process to require an appearance, and in default of compliance with that writ, an injunction to the sheriff to restore the possession. In proper cases, this proceeding will be found a valuable and expeditious remedy; but an injunction will not be granted, unless applied for in a reasonable time after committing the acts complained of. The practice on these bills is anomalous, and appears to be unaffected by the recent General Orders, save that the pleadings should be certified by counsel. Upon production of a certificate of the bill having been filed, and an affidavit verifying the statements in bill, upon motion of course during the Sittings, or on petition in vacation, an order for an injunction to the party, or, according to the practice adopted by the Master of the Rolls in *Hiddulph v. Molloy* (*ante*), a conditional order to issue both injunctions, will be granted. The practice now acted upon by his Honor is conformable to that laid down in the *Practice of Chancery* published by Sarah Cotter, p. 36, wherein it is stated, that "If the defendant has a mind to contest the matter, he must come in and appear and be examined on personal interrogatories; but where the Court gives a day to shew cause, the Court will sometimes hear what defence a defendant can make, by affidavit or otherwise, though, generally, the defendant is to shew cause on the plaintiff's affidavit." If no cause be shewn, the injunction to the sheriff to restore possession may be at once obtained. Should the defendant be disposed to contest the matter, he must come in to shew cause by affidavit, and if he controvert any material fact, the cause shewn will be allowed; and if the plaintiff desire to proceed, the defendant will be then required to enter an appearance; whereupon the plaintiff must, within four days, exhibit personal interrogatories (which must not extend beyond the charges in the bill), for the examination of the defendant. The personal interrogatories are to be filed in the office of one of the Chief Examiners. If the defendant neglect to answer within six days, if resident in or within twenty miles of Dublin, or within a lunar month (*General Order, dated 19th July, 1777*), if the defendant reside more than twenty miles from Dublin, an injunction to the sheriff may be obtained. Should the answer be filed, the cause may be set down for hearing, if the plaintiff's case be sufficiently admitted; if not, the plaintiff must, within a month from answer filed, serve notice on the defendant's solicitor, stating that the plaintiff intends to examine, and requiring the defendant to proceed to prove the matters of avoidance stated in his answer to the personal interrogatories. At the expiration of a month, either party may enter a rule to pass publication as usual, and, after publica-

Tuesday, May 19th.

POSSESSORY BILL—PRACTICE.

WM. HAWKINS BALL, PHILIP DOYNE, and HENRY SAMUEL CLOSE
v. DANIEL O'GRADY.*

THE plaintiff filed a possessory bill and affidavit, setting forth the several facts hereinafter mentioned, and thereupon, on the 6th of May last obtained an order, "that an injunction do issue, directing the defendant and his under-tenants and laborers, to deliver up to the plaintiffs the house and lands of Fortfergus, in the county of Clare; and also, that an injunction do issue, directed to the sheriff of the county of Clare, directing him to put the plaintiffs into the quiet and peaceable possession of the said premises, unless in eight days after the service of the said defendant with this order, good cause shall be shewn to the contrary." The defendant now came in to shew cause.

It seems that a possessory bill is not a proper remedy where the plaintiff's legal title to the possession is not clear, and there are matters of account in relation to the plaintiff's claim, in dispute between the parties.

It appeared from the bill and affidavit verifying it, that the plaintiffs, Messrs. Doyme and Close, being trustees named in the last will and testament of Benjamin Ball, deceased, and seized of the legal estate in the premises hereinafter mentioned, for the benefit of the plaintiff W. H. Ball, by indenture bearing date the 23d of April, 1830, demised to Edward O'Grady, his executors, administrators, and assigns, the lands of Fortfergus, in the county of Clare, for thirty-one years, from the 1st of May then last past, at the yearly rent of £250. 9s. 2d., which was secured in the usual way by the covenant to pay, and conditions of distress and re entry; and the said Edward O'Grady did thereby covenant, for himself, his executors, administrators and assigns, to and with the plaintiffs Doyme and Close, "that it should and might be lawful to and for them the said P. Doyme and H. S. Close, their heirs and assigns, at any time from and after the expiration of one year from the date of

* It has been thought more convenient to give this case in connexion with the preceding cases of *Biddulph v. Molloy* and *Sherrock v. Chartres*, than to postpone it for the sake of chronological order.

tion, the cause may be immediately set down for hearing at the Rolls, no subpoena to bear judgment being necessary. As to the general practice on these bills, see *How. Chan. Prac.* 41. *et seq.*; *Howard Sup. C. P.* 25 *et seq.*, and cases there cited; *The Practice of the Court of Chancery*, published by Sarah Cotter, 55, *et seq.*; 1 *Howard's Eq. Ex. Pr.* 310, *et seq.*; 2 *How. E. Ex. Pr.* 902, *et seq.*; *Bodkin v. Kealy*, *Ver. & Ser.* 303; *Stewart v. Stewart*, *Wallis' Rep.* by Lyne, 91; *Smith's Orders*, 75 n.; *Lowry's Orders*, *Eschequer*, 91; *Sir Richard Bolton's Rules*, No. 7; *Primate Boyle's Rules*, No. 30; *Smith's Orders*, 43; *General Orders*, 18th June, 1726; *ib.* 74, 11th July, 1727; *ib.* 75, 26th June, 1732; *ib.* 82, 24th Feb. 1737; *ib.* 86, 20th May, 1751; *ib.* 92, 19th July, 1777; *ib.* 98; *Edgworth v. Edgworth*, 2 Bro. P. C. 27 (Tomlin's Ed.); *Luttrell v. Ingham* 7 Bro. P. C. 590; and *Vernon v. Vernon*, 4 Bro. P. C. 398.—See *Ball v. O'Grady*, *supra*.

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"the said lease, to *re-assume* the quiet and peaceable possession of the premises thereby demised, on giving twelve months' previous notice in writing of such their intention so to re-assume same, such notice to be delivered personally to the said Edw. O'Grady or his executors, administrators, or assigns, or delivered at the mansion or dwelling-house thereby demised, and to be given so as to expire on the 1st day of May in such year as such possession should be required to be given up; and the said Edw. O'Grady, for himself, his executors, administrators, and assigns, covenanted to and with the plaintiffs Doyme and Close, that he the said Edw. O'Grady, his executors, administrators and assigns, should and would, within twelve months from the service of such notice at such dwelling-house, or personally on the said Edw. O'Grady, his executors, administrators or assigns, surrender and yield up unto said Philip Doyme and Henry Samuel Close, their heirs and assigns, in good and sufficient tenantable order, repair, and condition, the quiet and peaceable possession of the premises thereby demised, and every part thereof, and also of the several plantations, &c., and every part thereof, without any delay or excuse whatsoever, and would at the same time pay and discharge unto the said P. Doyme and H. S. Close all rent and arrears of rent which might accrue due to and for the day of surrendering up said premises."

Edward O'Grady, the lessee, entered and continued in possession under the lease until some time in the year 1835, when he died, having by his will appointed as his executor the present defendant, who obtained probate and entered into possession of the demised premises, and paid the rent up to and for the 1st of May, 1839. On the 29th of April, 1839, the plaintiffs Doyme and Close, at the request of the plaintiff W. H. Ball, caused the defendant to be personally served with a notice in writing, dated the 27th of April, 1839, whereby, after reciting the covenant already mentioned, they apprised him of their intention to re-assume, and required him to surrender and deliver up on the 1st of May, which would be in the year 1840, the quiet and peaceable possession of the demised premises.

On the 11th of April last, the defendant wrote a letter to the plaintiff W. H. Ball, demanding £1000 as the consideration for which he would give up the possession, and threatening, in the event of his terms being refused, that he would immediately let "every foot of green sod in Fortfergus for *muck** ground." The plaintiffs declined entering into any negotiation with the defendant on the subject of his letter; and on the 1st of May last, the possession was demanded pursuant to the notice, but the defendant refused to give it up, and the bill stated that he now held it *unlawfully and by force*.

* *i. e.* to be broken up. The defendant proceeded to put this threat into execution, whereupon the plaintiff immediately filed a bill, and obtained an injunction against him.

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The defendant, by his affidavit, admitted the statements in the bill, except as to his holding the possession *unlawfully or by force*, and submitted to the judgment of the Court the legal effect of the provisions and covenants in the lease, which contained the following covenant in addition to that already mentioned :—" And the said P. Doyne and H. S. Close "do, for themselves, their heirs and assigns, covenant (&c.) to and with "the said Edw. O'Grady, his executors, administrators and assigns, that "if at any time within fifteen years from the date hereof, he the said "Edw. O'Grady, his executors, administrators or assigns, shall put or "place out, or cause or procure to be put or placed out on the sea shore "of the premises hereby demised any stones for the purpose of making, "and shall thereby make and erect a sea-weed-bank, then and in such "case, he the said Edw. O'Grady, his executors, administrators, and as- "signs, shall be paid and allowed, and they the said P. Doyne and H. "S. Close do hereby for themselves, their heirs and assigns, covenant "and promise to pay and allow to him the said Edw. O'Grady, his exe- "cutors, administrators and assigns, all and every expense he or they "shall sustain in putting out such stones and making such sea-weed "bank : Provided, however, and it is hereby agreed, that such expenses "are to be paid and allowed to the said Edw. O'Grady, &c., in the "event only of the said lands and premises being re-assumed by the said "P. Doyne and H. S. Close, or their heirs or assigns, pursuant to the "covenant in that respect hereinbefore mentioned, within the aforesaid "period of fifteen years from the date hereof ; it being perfectly under- "stood by and between the parties hereto, that he the said E. O'Grady, " &c. shall not be entitled to ask or demand for putting out such stones "on the sea-shore, or making and constructing such sea-weed bank, un- "less he or they shall be required to surrender said premises, and shall "as aforesaid surrender and yield up the quiet and peaceable possession "thereof within the said period of fifteen years from the date hereof : "provided also, if any dispute or disagreement shall arise as to the amount "of the expenses of making such sea-weed bank, that the same shall be "ascertained by reference to two or more indifferently chosen compe- "tent persons, by whose decision the parties hereto and their respective "heirs, executors, administrators and assigns do hereby agree to abide."

The defendant further stated by his affidavit, that a large sum had been expended by Edw. O'Grady, the lessee, in improving the farm, and also in putting out stones and making a sea-weed bank, which the defendant considered to be of the value of more than £200, and also in permanently repairing and almost re-building the mansion-house, under an express agreement between the agent of the plaintiff and the said Edw. O'Grady, that he should be allowed £100 for so doing. The defendant therefore submitted that this Court ought not to enable the plain- tiffs to re-assume the possession, without making compensation for this heavy expenditure, for which they had not as yet made any allowance.

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Messrs. Warren, Q. C., Coppinger and W. Smith, for the defendants, submitted that the plaintiffs did not shew and had not a clear title either legal or equitable to the possession; that the term was still subsisting, as the agreement set forth in the bill was not a condition operating as a defeasance of the estate, but a mere covenant to give up the possession without a right of re-entry upon the breach of it: *Doe d. Wilson v. Phillips* (a); *Doe d. Spencer v. Godwin* (b); that under the circumstances of this case, the Court would not decree a specific performance without obliging the plaintiffs to come to an equitable account with the defendant for the matters stated in his affidavit; and that the present summary proceeding was wholly inapplicable to such a case. They further submitted, that the jurisdiction of this Court on possessory bills was originally grounded on the statutes against forcible entry and detainer, and limited to cases within the provisions of those statutes upon which an indictment would lie; that the present was not a case of that kind; 1 *Hawk. P.C.* 500, S. 23, 503; and although this Court, by reason of its inherent jurisdiction in matters of fraud, might interfere summarily between landlord and tenant in cases of clear overholding or fraudulent detention after the term, the landlord should shew by affidavit what was the term demised, and also that it had expired. 1 *Eq. Pl. Ast.* 334.

Messrs. W. Brooke, Q. C., and Hawkins, for the plaintiffs, contended that the argument of the parties, that it should be lawful for the lessors "to re-assume the possession," upon giving twelve months' notice to quit, and that the lessee should surrender and deliver it up upon receiving such notice, was to be considered as a condition to which the term was subject, and not as a covenant. That the tenancy was, therefore, determined by the notice on the 1st May 1840, when the possession was demanded and refused, and that the defendant's subsequent detention was forcible and unlawful. *Shep. Touchst.* 123-4; *Dullison*, 8; *Sir W. Jones*, 166; *Doe d. Willson v. Abel* (c); *Russell v. Coggins* (d). As to the compensation claimed by the defendant, they submitted that it appeared from his own statement, that the entire of the alleged outlay was made by Edward O'Grady, the lessee, who died five years since; they further stated, that no demand had ever been made on this account until the defendant sought a pretext for refusing to comply with the condition in the lease, and to give up the possession; that as to the expense of making the sea-weed bank, if such had in fact been made, the plaintiffs would have been ready to abide by their agreement, and to make full compensation, but that the defendant's

(a) 2 Bing 13, & 9 Moore, 46.

(c) 2 Mau. & Sel. 54.

(b) 4 Mau. & Sel. 265; Dyer, 150.

(d) 8 Ves. 34.

giving up the quiet and peaceable possession upon notice according to the condition, within fifteen years from the date of the lease, was a condition precedent to his right to any compensation for the sea-weed bank. They contended that these claims of the defendant were not properly cognisable by the Court on a proceeding of this kind,—where the right to the possession was the whole matter in question; that the defendant might proceed at law, if any right he had, to recover compensation; but that the plaintiffs' right to the possession was clear, and no sufficient cause had been shewn against making absolute the conditional order for the injunction; *Luttrell v. Lord Irnham* (a); 1 *How Excheq.* 15.

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The case was ordered to stand for consideration, and as this was the last day of the Easter Sittings, his Honor did not pronounce his judgment at length, but in a day or two sent down to the Rolls' Office the following order:—

Allow the cause shewn, but without costs.

It is understood that the defendant would have been allowed his costs of shewing cause but for his threatening letter above mentioned.

(a) 7 Bro. P. C. 338.

Friday, April 24th.

SEQUESTRATION—NON-PERFORMANCE OF DECREE—SERVICE.

VEREKER and others v. LORD GORT and others.

MR. COLLINS Q. C., moved for a sequestration against the defendant for not performing the decree bearing date the 12th of February 1839, and directing him to pay to the plaintiff £19,221. 2s. The motion was grounded upon an affidavit, stating that on the 15th of February, 1840, the deponent personally served the defendant at No. 4 Kildare-street, in the city of Dublin, with the said decree, by leaving with him a true copy thereof, and at the same time shewing to him the original; and that in pursuance of a power of attorney under the hand and seal of the plaintiff; deponent, at the time of said service, demanded from the said defendant the said sum in said decree mentioned, but that the said defendant then declined to pay, and had not since paid the same, or any part thereof.

Upon personal service of the defendant with the decree directing him to pay a certain sum of money to the plaintiff, and on demand of payment by a third person under a power of attorney, it is enough to shew the power of attorney to the defendant;

and it is not necessary in order to ground a motion for a sequestration for not paying the money pursuant to the decree, it should appear that at the time of the service of the decree and of the demand, a copy of the power of attorney was left with the defendant.

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Mr. *Latouche*, for the defendant, objected that the affidavit was insufficient, as it did not state that the power of attorney to demand and receive the money was shewn at the time of the service on the defendant; nor that a copy of it was left with him; *Wyatt Pr. Reg.* 205; *Laugher v. Laugher* (a).

THE MASTER OF THE ROLLS said that the power of attorney ought to have been shewn, and permitted the motion to stand over for a supplemental affidavit upon that point.

Saturday, April 25th.

The motion was now renewed upon the supplemental affidavit, which stated that the deponent shewed to the defendant the power of attorney at the same time he served the decree; and that at the same time the defendant said, "he knew all about it," or words to that effect.

Mr. *Latouche*, for the defendant, objected that a copy of the power of attorney had not been left with him, and that the suit was abated by the death of Lord Guillamore, who was a co-plaintiff.

The case stood for consideration.

Saturday, April 27th.

THE MASTER OF THE ROLLS, after stating application in this case and affidavits made in support of it, delivered his judgment to the following effect:—

The defendant's counsel has taken two objections to this application; first, that this cause is abated by the death of the late Lord Guillamore who was a co-plaintiff; and secondly, that a copy of the power of attorney, under which the demand of payment was made, was not left with the defendant. The abatement, I think, does not affect the present motion, as the decree ordered the payment not to the co-plaintiffs, but to Mr. Vereker only, by whom the warrant of attorney was executed to demand and receive it. As to the other point there are decisions both ways: *Laugher v. Laugher*; *Rex v. Packwood* (b); *Bass v. Maitland* (c); *Doe d. Cope v. Johnson* (d); *Hartley v. Barlow* (e); *Rex v. Martin* (f). This last case lays down what appears to me to be the proper rule, and on just grounds. As the warrant of attorney must be shewn, I can see no use in serving a copy of it; and, in my opinion, it is not necessary to do so. Therefore, I cannot allow either of the objections.

In the case of sequestrations against Peers, it was formerly the practice to make a rule *nisi* in the first instance; but the 176th New Rule, which embraces Peers as well as others, gives a rule absolute at once.

Order for sequestration.

(a) 1 Cr. & Jer. 398.

(c) 8 Moore, 44.

(e) 1 Chitt. 229.

(b) 2 Dowl. P. C. 570.

(d) 7 Dowl. P. C. 550.

(f) Alc. & Nap. 45.

Thursday, February 13th.

INFANT DEFENDANT—REFERENCE TO MASTER, AS
TO DEFENCE OR COMPROMISE, &c.

HARE v. LORD MOUNTCASHEL and others.

By lease bearing date the 8th of July 1775, Lord Mountcashel demised part of the lands of Hoar Abbey, near Cashel, to the Rev. Patrick Hare "for the lives and life of" (three persons therein named) "and the longest liver and survivor of them; and also for and during the life of any other such person as should be nominated by the said Patrick Hare, his heirs or assigns, next after the death of either of the said lives therein named."—The lessee's interest became afterwards by assignment vested in the plaintiff. In April 1834, Lord Mountcashel advertised the Hoar Abbey estate for sale, and a correspondence ensued between the plaintiff and his Lordship's agent, respecting the construction and effect of the *habendum* in the lease: the one insisting that the new life was not to be nominated until after the failure of all the lives named in the lease; and the other, that the right of nomination should be exercised, if at all, next after the death of whichever of the *celles que vies* should first die. The printed rental of the estate, after the description of the plaintiff's holding, had this observation:—"This tenant claims a right to have another life added to this lease, after the death of the last life therein named; but Mr. Pennefather has given his opinion that upon the due construction of the lease, he is not so entitled." On the 13th of June 1837, the estate was put up for sale by public auction, and William Weir, Esq. became the purchaser. At the sale Mr. Pennefather's opinion was read; and the plaintiff being in attendance, produced and read the opinion of another eminent counsel in favor of a different interpretation of the lease. One of the lives dropped on the 15th of December 1836.* Immediately after the sale and before delivery of the abstract of title to the purchaser, the plaintiff served notices on Lord Mountcashel and Mr. Weir, nominating his son, Patrick Hare, as the new life instead of the *cestui que vie* who died in December 1836; and calling upon his Lordship to grant the renewal, and Mr. Weir to consent to his doing so. These notices not having been replied to, the plaintiff filed his bill in this cause against Lord Mountcashel and Mr. Weir, stating the foregoing facts; and praying that the proper parties should execute to him a new lease for

Under the circumstances, the Court ordered a reference to the Master to inquire and report whether it would be for the benefit of an infant defendant, that the suit should be defended in his name or that of his trustee; and if to be defended, what were the funds properly applicable to the defence; and if not to be defended, on what terms it would be proper that it should be amicably settled.

* The Reporter did not collect whether or not any of the lives fell before December 1836, or whether there was more than one of them now surviving; but, for the purpose of this report, it seemed unimportant.

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the surviving lives of the old lease, and the additional life of the said Patrick Hare. Lord Mountcashel answered, that he had sold the estate to the defendant William Weir, on the 13th of June 1837, and, therefore could not make the new lease required by the plaintiff. On the 5th of January 1838, the defendant, W. Weir, caused a notice of that date to be served on the plaintiff, whereby after detailing the plaintiff's *laches* in not having the new lease executed to him while Lord Mountcashel was the owner of the estate; the more especially as he knew of the intended sale, and of his Lordship's intention of controverting the right to have any life added to the term granted by the original lease, save a life to be nominated next after the death of whichever of the lives therein named should first die; nevertheless, the defendant, W. Weir, undertook to execute the new lease required by the plaintiff, upon the terms of the plaintiff's dismissing his bill with costs as against him. The plaintiff declined the terms proposed; and the defendant, W. Weir, having thereupon filed his answer setting forth the notice, died intestate in February 1838. After his death, the conveyance of the Hoar Abbey estate was executed to a trustee for his heir-at-law, a minor; and the plaintiff then filed a supplemental bill against the trustee and the minor, to have the benefit of the suit against them.

Mr. *Jenkins*, upon the foregoing facts, now moved on behalf of the minor, that it should be referred to one of the Masters to inquire and report, whether or not it would be for the minor's benefit that this suit should be defended in his name or that of his trustee; and if to be defended, what were the funds properly applicable to the defence; and if not to be defended, upon what terms it would be proper that it should be amicably settled. He cited *Taner v. Ivis* (a); *Whittaker v. Morlar* (b); *Brookfield v. Bradley* (c); *Newland on Costs*, 589.

THE MASTER OF THE ROLLS said that this was a very proper application, and granted the reference as desired.*

(a) 2 Ves. Sen. 466.

(b) 1 Cox, 286.

(c) Jacob, 632.

* Where the compromise of a suit is proposed, and appears to be for the benefit of an infant defendant, the Court will sanction it without a reference to the Master. *John Lip, dit v. Walter Holley, by John Bubb his guardian*, 1 Beav. 423.

Thursday, February 13th.

SOLICITOR'S LIEN—WAIVER OF—TAKING OTHER SECURITY.

BROWNLOW v. KEATINGE, THE EARL OF MEATH and others.

THIS was an application for a reference to the Master, to inquire and report whether B. B. Johnston, and Richard Magrath, solicitors, respectively held certain title deeds relating to the premises directed to be sold by the decree in this cause, subject to any and what lien; and whether it would be for the benefit of the parties in this cause that the respective demands of the said Johnston and Magrath should be paid; and if so, that the Master should report the funds applicable to pay the same. The lien claimed by Mr. Magrath was admitted; the question was as to the lien claimed by Mr. Johnston. Johnston's affidavit stated, that long previous to the year 1815, he had been the solicitor and attorney of the late Maurice Keatinge in the pleadings mentioned, in various causes at law and in equity; and that the said Keatinge's title-deeds relating to his several properties in the pleadings mentioned, had come into deponent's possession in the course of his employment as such solicitor. That in the year 1815, the said Keatinge being about to leave the country, called for deponent's bill of costs, which was accordingly furnished, amounting to £550. That Keatinge then gave to deponent his promissory note in these words:—"Dublin, July 15th, 1815.—I promise to pay B. B. Johnston, Esq., the sum of £550, value received, with interest thereon.—M. Keatinge:—"and said "that upon his arrival in London he would give directions to Mr. Burroughs his agent there to pay the amount to deponent; and that the promissory note should be Burroughs' warrant to pay, and voucher for payment of the amount." That there was not any contract, agreement, or understanding between deponent and Keatinge to the effect, nor was it deponent's intention, nor, as he believed, Keatinge's, that upon deponent's taking the promissory note, he should be considered as waiving or giving up the lien which he had on the said Keatinge's title deeds in his possession as a security for his costs. That the promissory note was not paid. That upon Keatinge's departure from this country, he authorised deponent to receive the rent accruing out of his property in Church-street; and from that period to the year 1838, deponent continued in the receipt of the said rent, and with the consent of the said Keatinge continued to apply same to the liquidation of the accruing interest upon said sum so due to deponent. That deponent regularly accounted for the rent with Mr. John O'Neill, who was the said M. Keatinge's agent, until the year 1828, when the said O'Neill died; and

A solicitor having a lien for costs on title deeds, took from the client a bond conditioned for the amount of the costs with interest at £5 per cent., and regularly received the interest for several years afterwards, but still retained the deeds. In a general creditor suit subsequently instituted, it appeared that the entire estate of the client would be insufficient for creditors whose securities were prior to the bond, but should have been postponed to the lien. The solicitor stated on oath that he accepted the bond only as a collateral security, and never intended to give up his lien. *Held*, that having taken a security for amount of the costs with interest, the lien was gone.

Whether the mere taking a security for the amount of costs without more extinguishes the lien, *Quare*.

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under his notice,* yet, in three years afterwards, when it had been perhaps more considered and better understood, he appears to have acquiesced in it;† and notwithstanding the doubts that were expressed, Lord Eldon, after full consideration, re-asserted, in *Balch v. Symes (a)*, his former opinion. I therefore think that we must now take it to be the law, and that my order in the present case must be—

Refer it to the Master to inquire and report as to the lien of Mr. Richard Magrath, as desired; but refuse the application for a reference as to the lien of Mr. B. B. Johnston, the Court declaring that he has no lien.

(a) 1 Turn. & Russ. 87.

* In *Stevenson v. Blakelock*, 1 Mau. & Selw. 535.

† *Chase v. Westmore*, 5 Mau. & Selw. 180.

Monday, February 10th.

PRACTICE—DEEDS RECITED AND RELIED UPON IN ANSWER—INSPECTION OF.

O'CONNELL, administrator of O'CONNELL, deceased, v. Sir EDWARD DENNY, Bart. and others.

Bill for specific performance of agreement for a lease for ever. The defendant insisted that the contract could not be performed as it exceeded his leasing powers and set out in his answer two settlements of the estate, to which he craved leave to refer when produced, but did not admit that they were in his possession. The answer having been unexcepted to, and issue having been joined, the defendant served notice on the plaintiff in 1837, requiring him to admit one of the settlements, which then lay and should continue for a week at the office of his solicitor for inspection. After several witnesses had been examined, the plaintiff now moved that he should be at liberty to inspect the two deeds relied upon in the defendant's answer; or, if necessary, that he might amend his bill for the purpose of procuring sufficient admissions from the defendant that the deeds were in his possession. The motion was refused with costs.—The proper mode of raising the question as to the plaintiff's right to inspect the deeds should have been by excepting to the answer for not admitting the possession.

AFTER several witnesses had been examined in this cause, but before publication, an application was now made on behalf of the plaintiff, that the defendant Sir Edward Denny should bring in and lodge in the proper office certain deeds stated in his answer to bear date respectively the 26th of May 1795, and 11th of March 1819, and upon which he relied, that the plaintiff might inspect and take copies of them; or, in case the Court should be of opinion that the said defendant did not by his answer sufficiently admit the possession of the said deeds, that the plaintiff should be at liberty to amend his bill so as to oblige the defendant to state accurately where the said deeds now were, &c.

It appeared that the bill was filed in February 1836, by the plaintiff

as administrator of Rickard O'Connell, deceased, against Sir Edward Denny and his trustees, for specific performance of an agreement in writing, dated the 8th of October 1828, whereby the late Sir Edward Denny and his eldest son, the present defendant, agreed with the said Rickard O'Connell deceased, to give him at a reduced rent therein specified, a lease for ever of certain lands (part of the Denny estate) in the county Kerry, of which the said O'Connell was then the tenant. The bill stated that when the agreement was entered into, the late Sir Edward and his son, the present defendant, "were seized in fee of, or "were otherwise well entitled to" the lands in question; that the agreement was made in consideration of £200 paid by Rickard O'Connell to the late Sir Edward; but the letter of agreement, which was set forth in the bill, was silent as to the consideration. The bill prayed specific performance; and that "if it should plainly appear that the said "defendant cannot grant leases for ever of said lots of ground, that "then he may be decreed to execute the longest leases he has power "to grant." The defendant Sir Edward Denny filed his answer in the course of the year 1836, and thereby resisted the execution of the agreement upon the ground that it was obtained by fraud, and greatly exceeded the leasing powers of both his father and himself; and that, being in consideration of £200, it was contrary to the conditions to which those powers were subject. The answer seemed to contain very full recitals of the deeds now called for (being two settlements of the Denny estate) by which it appeared that the late Sir Edward and the present defendant were entitled only to estates for life, with powers to make leases at the highest rent without fine, and for limited terms only. After the recitals, the answer referred to each of the deeds thus:—"As by the said last in part recited deed will, when produced, "and reference being thereunto had, fully and at large appear." After the recital of and reference to the latter deed, the answer proceeded:—"This defendant further answering, saith, that the hereditaments "and premises in bill mentioned, are part of the hereditaments and "premises comprised in said indenture; and this defendant has fully "and truly set forth the nature of the estate and interest of this "defendant, and of the said Sir Edward Denny deceased, in the said "premises, and the precise and particular powers of leasing which this "defendant or the said Sir Edward Denny deceased then had; and "this defendant further saith, that neither he nor his father had any "other or greater powers of leasing or demising said lands than were "contained in the said deed of the 11th of March 1819, and herein "before fully and truly set forth."

It further appeared that after issue had been joined, and when the parties were about to prepare their proofs, the defendant's solicitor on the 7th of July 1837, served on the plaintiff's solicitor the usual notice under 203d Rule of November 1834, requiring him to admit

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the original deed of the 11th of March 1819, in the defendant's answer mentioned, and apprising him that it then lay for his and the plaintiff's inspection at the office of the defendant's solicitor, and should do so for six days from the time of the service, &c.

Mr. *Jordan Roche*, for the motion, contended, that as the defendant, by referring to the deeds, had made them part of his answer, the plaintiff had a right to inspect them, even though they might happen to be material to the defendant's case only. *Athyns v. Wright* (a); *Tyler v. Drayton* (b); *Hardman v. Ellames* (c); *Bettison v. Farrington* (d); *Storey v. Lord John George Lennox* (e). The defendant's possession, at least of one of the deeds, was distinctly admitted by the notice of the 7th of July, 1837. There can be little doubt that he is in possession of the other also; and from the nature of the plaintiff's case, and the relief prayed, it is of the utmost importance to him to obtain accurate information as to the contents of both.

Mr. *J. Henn*, Q. C., and Mr. *Hickson*, Q. C., for Sir Edward Denny. —The plaintiff's proceedings are altogether irregular. His title is as administrator. He says that Sir Edward Denny being seized in fee or of some other sufficient estate, agreed with Rickard O'Connell deceased, to give him a lease for ever; that Rickard O'Connell died, having made his will and appointed executors; but that the executors named in the will having renounced, he obtained administration with the will annexed, and that the right under the agreement—the right to have a fee-farm grant—survived to him as administrator, and the heir is no party. But independently of that objection, the present application must be refused. In the cases cited upon the other side, the defendant by his answer admitted the possession of the deeds, and the subsequent order for their production was grounded upon the admission. No such admission is to be found in the defendant's answer in this case; nor could the application for the deeds be sustained at this stage of the cause. It does not appear that the deeds in question are at all material to the plaintiff's case; but even if they were, he has mistaken his course, and cannot have them now.—The second branch of the application should also be refused. After issue has been joined, and witnesses examined, and the deeds proved, the plaintiff should not be permitted to withdraw the replication, and defeat all the proofs that have been made, for the mere purpose of procuring an inspection of the deeds,

(a) 14 Ves. 214.

(b) 2 Sim. & Stu. 310.

(c) 2 My. & Kee. 747, 758.

(d) 3 P. Wms. 363.

(e) 1 My. & Cr. 525.

See, also, *Stroud v. Deacon*, 1 Ves. sen. 31; *Baden v. Dore*, 2 Ves. sen. 445; *Shaftesbury v. Arrowsmith*, 4 Ves. 66; *Evans v. Richards*, 1 Swanst. 8; *The Princess of Wales v. Lord Liverpool*, 1 Swanst. 124.

which are merely defensive, and now our evidence. If amendment of the bill could have served his purpose, he should have made it upon the coming in of the answer; but by his delay he has lost the opportunity. However, the amendment would be fruitless; for the defendant might and would resist the production of the deeds. *Sugd. Vendors and Purchasers*, pp. 306-8; *White v. Foljambe (a)*. The Court of Exchequer has decided, in a case of *Costello v. Hunt*,* that a person taking an agreement for a lease cannot, as plaintiff in a suit for specific performance, compel the landlord to shew his title. The decisions in the cases of *Bettison v. Farrington* and *Hardman v. Ellames* have been doubted.†

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The case stood to be considered.

Saturday, February 15th.

MASTER OF THE ROLLS.

In this case the plaintiff claims, as administrator of Rickard O'Connell, deceased, specific performance of an agreement for a lease for ever. I will not give any opinion upon this rather curious title,‡ as the defendant has not raised the question, but has put in his answer, insisting that his leasing power is so limited that the contract cannot be performed, and relying upon two settlements under which he and his father derived their respective estates and leasing powers. He refers to the deeds when produced; but the references do not contain any admission that they are in his possession, nor shew where they are.—[His HONOR here read the words of reference already stated.]—To this answer no exception was taken; and now, after issue has been joined, and several witnesses examined, and more than three years have elapsed since the filing of the answer, the plaintiff moves that he shall be at liberty to inspect and take copies of the deeds, or, if necessary, that he may amend his bill, for the purpose of procuring sufficient admissions from the defendant that the deeds are in his possession.

It is not at present necessary that I should give any opinion upon the general question, whether or not a plaintiff can, under any circumstances, be entitled to require the inspection of documents which

(a) 11 Ves. 337.

* Not reported.

† See *Hare on Discovery*, also *Mr. Wigram's Essay*, pp. 120, *et seq.*

‡ The Reporter believes that the plaintiff in fact was heir-at-law as well as administrator; but it did not so appear by the bill. Probably, the defendant should have succeeded upon either general or special demurrer for want of parties—(see next case); but as he has answered, it may be a question how far the objection would prevail at the hearing. See *Phillips v. Phillips, ante*, vol. 1, p. 179; also *England v. Downs*, and *Lambert v. Hutchinson*, 1 Beav. 96, 277; also *Mitchell v. Bailey*, 3 Madd. 61; *Attorney-General v. Hill*, 3 My. & Cr. 247; *Lowry v. Fulton*, 9 Sim. 104.

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do not form part of the case made by his bill, but which are relied upon and referred to by the defendant as matter of defence. Perhaps, if the defendant had by his answer admitted the possession of the deeds, this case might have borne some resemblance in principle to that of the *Earl of Salisbury v. Cecil* (a). But here there is no such admission, and I need not consider the special question which might have arisen, as the application fails upon the preliminary objection that the possession is not admitted. In *Darwin v. Clarke* (b), it was decided that unless a defendant by his answer admits having possession or power of the deed, his admission of its execution, and craving leave to refer to it when produced, will not sustain a motion for the production of it. In *Heeman v. Midland* (c), the defendant by her answer admitted that at some time past she had certain deeds in her possession, and upon that admission the plaintiff moved for their production; but it was held that the admission was not sufficient to warrant the order, as the defendant had not admitted that at the time of answering she had the deeds. In *Barnett v. Noble* (d), on a motion for the defendant to produce a deed before the examiner, Lord Eldon refused an affidavit of the fact that the deed was in the defendant's possession, as such possession should appear admitted in the answer. As to the deed of 26th of May 1795, it does not appear that the defendant ever had it; as to the other deed, bearing date the 11th of March 1819, it is true that the defendant by his notice served in this cause, admitted that in July 1837, it was in his possession; but although he had it then he may not have it now; and *Heeman v. Midland* shews that the Court will not make a present order upon an admission of the possession some time ago. Besides, the notice which shews the defendant's admission of the possession in July 1837 of this latter deed, also shews that the plaintiff then had the amplest opportunity of inspecting it, and was called upon to do so: under such circumstances, the plaintiff cannot now be entitled to call for its re-production; *Jones v. Thomas* (e). Therefore, this motion fails utterly in so far as it seeks the production of the deeds; and it fails also in the second branch of it; as under the circumstances and at this stage of the cause, the Court could not permit the plaintiff to amend his bill for the mere purpose of raising a question which he might and ought to have raised upwards of three years ago, and by a totally different mode of proceeding. His proper course would have been by way of exception to the answer for not containing the necessary admissions as to the deeds.

I must refuse this application, and with costs.*

(a) 1 Cox, 277-8.

(c) 4 Madd. 391.

(b) 8 Ves. 158.

(d) 1 Jac. & W. 227.

(e) 2 Yo. & Col. 312.

* See *Bligh v. Benson*, 7 Price, 205.

Thursday, April 23d.

**DEMURRER—BILL FOR FORECLOSURE OF MORTGAGE
AND SALE, &c.**

O'CONNELL and others v. CUMMINS and others.

THE bill in this cause was for the foreclosure of a mortgage, and prayed an account of the sum due, and that the defendant might be foreclosed of all equity of redemption, and the mortgaged premises sold, &c., and the defendant ordered to bring in and lodge all title-deeds and leases, &c., relating to the mortgaged premises, in his possession or power. It stated that the defendant Denis Cummins being, under and by virtue of a lease of the 29th of September 1831, seized and possessed of the premises (comprised in the mortgage) for three lives and ninety-nine years, to commence from the death of the survivor; and being in the month of October 1834, indebted to Francis Lyons, Stephen Hayes, John Hanley, and Thomas Lyons, merchants and co-partners, in the sum of £219, he did, by indenture, dated the 24th of October 1834, made between the said defendant of the first part, the said F. Lyons, S. Hayes, J. Hanley and T. Lyons of the second part, and Wm. Collins of the third part, in pursuance of an agreement, &c., and in consideration of the said sum of £219, so due as aforesaid, convey and assign the premises comprised in the said lease of 1831, and all his estate and interest therein to the said Wm. Collins, his heirs, executors, and administrators, in trust nevertheless for the said F. Lyons, S. Hayes, J. Hanley, and T. Lyons, "as by the said indenture now in the plaintiffs' possession, and to which they crave leave to refer, when produced will appear."— "That the said mortgage contains a proviso for redemption in favor of the said defendant, his heirs, executors, and administrators, upon his or their at any time paying off and discharging the said sum of £219, with all interest thereon up to such period of redemption." The bill further shewed that the plaintiffs were entitled as assignees, and that the sum of £234 was now due to them upon the mortgage for principal and interest.

To this bill the defendant Denis Cummins filed a general demurrer.

Mr. Deasy, for the demurrer.—The plaintiffs by their bill shew that

allowed: as it appeared by the bill that this was in the nature of a Welsh mortgage; and no case was shewn entitling the plaintiffs to have a sale independently of a foreclosure; and it did not appear that the title-deeds were sought otherwise than for the purposes of the foreclosure and sale, to neither of which were the plaintiffs entitled by their bill.

On the hearing of the demurrer, the plaintiffs' counsel produced, and sought to read in aid of the bill, the mortgage deed, which contained an express trust for a sale; but the Court held that they were not entitled to do so.—As to *Weld v. Bonham*, 2 Sim. & Stu. 91, *quarc.*

The bill stated a mortgage made by the defendant in consideration of £219, and that the said mortgage contains a proviso for redemption in favor of the said defendant, his heirs, executors, and administrators, upon his or their at any time paying off the said £219 with interest,— "as by said indenture in plaintiffs' possession, and to which they crave leave to refer, when produced will appear;" and prayed an account of the sum due; and that the defendant might be foreclosed of all equity of redemption; and for a sale; and that the defendant might be ordered to bring in the title-deeds. To this bill a general demurrer was

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they are not entitled to have a foreclosure of this mortgage, as it is stated to contain a proviso for redemption "in favor of the said defendant, his heirs, executors and administrators at any time" (a). *Bonham v. Newcombe* (b); *Howell v. Price* (c); *Hartpoole v. Welsh* (d); *Yates v. Harnbly* (e); *Linget v. Scarven* (f); *Teulon v. Curtis* (g); *Fonblanque Equity*, 268; 2 *Maddock's Chancery*, 651; 2 *Powell on Mortgages*, 965; *Coots on Mortgages*, 232. They do not state any case entitling them to have a sale of the mortgaged premises; and they have no right to call for the production of the title-deeds for the purpose of a foreclosure and sale, to neither of which do they appear to be entitled.

Mr *Harding* and Mr. *Collins*, Q. C., for the bill.—The mortgage deed contains an express trust for a sale for payment of the debt; and although the bill does not particularly recite this trust, yet as the plaintiffs have by their bill craved leave to refer to the deed, they are entitled upon this demurrer to produce it, as they now do, for the inspection of the Court, and to read it in aid of the allegations in the bill. *Weld v. Bonham* (h). It, therefore, appears that the plaintiffs are entitled to have a sale as prayed. But the bill also seeks a discovery of the title deeds relating to the mortgaged premises, and prays that the defendant may be ordered to bring in and lodge them. The plaintiffs are clearly entitled to a discovery of the deeds, and probably to a deposit of them also. This demurrer is, therefore, two wide.

Mr. *Blake*, Q. C., in reply.—*Weld v. Bonham* is not law. The sound rule upon the subject has been laid down by Lord Cottenham in *Campbell v. Mackay* (i). The question here is simply, whether the plaintiffs have by their bill stated a case entitling them to all or any part of the relief they have prayed; and for the reasons already mentioned it is plain that they have not.

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The bill now before the Court cannot, I think, be considered otherwise than as a mere foreclosure bill. It prays that an account may be taken of what is due on foot of the mortgage;—that the defendant may be foreclosed of all equity of redemption;—for a sale;—and that the defendant may be ordered to bring in and lodge with the Master all title-deeds, leases, and counterparts of leases relating to the mortgaged premises, in his possession. It states the proviso of the mortgage, by

(a) Co. Lit. 208 (a),—219 (a).

(b) 2 Vent. 365; 1 Vern. 232.

(c) Prects. Ch. 423; Gilb. Eq. R. 106; 1 P. Wms. 294.

(d) 5 Bro. P. C. 297.

(e) 2 Atk. 232.

(f) 1 Ves. Sen. 406.

(g) 1 Young, 610.

(h) 2 Sim. & Stu. 91; 2 Dan. Ch. P. 20-1.

(i) 1 My. & Cr. 613.

which it appears that there is no equity of redemption, and that the plaintiffs are not entitled to have a foreclosure. It does not contain any statement by which the Court might understand that independently of the right to a foreclosure, the plaintiffs are entitled to have a sale of the mortgaged premises for payment of their demand ; but the sale and production of the title-deeds appear to have been prayed merely as relief consequential and necessary to make the primary relief,—viz., the foreclosure of the mortgage—productive to the plaintiffs. I am, therefore, clearly of opinion that this demurrer must be allowed.

I must own I should have great difficulty in assenting to the proposition that on demurrer the Court may look outside the pleadings for the grounds of its judgment ; or, that the judgment of the Court could properly be founded in any degree upon a fact not appearing upon the record. But even if it should be allowable on the argument of a question of law upon facts as pleaded, to read in aid of the statements on record an unproved document, the genuineness and identity of which neither the Court nor the opposite party have the opportunity of testing ; yet such a measure of allowance could not avail the plaintiffs in this case, as there is not in their bill any charge or claim of right entitling them to have a sale of the mortgaged premises independently of a foreclosure ; and, therefore, there is none of which it could be said with any propriety that the trust for a sale, alleged to be contained in the mortgage deed, might be read *in aid*. I may also observe, that even if the plaintiffs had set forth in this bill the alleged trust for a sale now stated at the bar, I doubt that it could help them much, as it does not appear that the sale may not have been obtained as of course upon application to the trustee, nor that the interference of a Court of Equity was at all necessary for the purpose.

Demurrer allowed.

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Saturday, April 25th.

**DEMURRER AND PLEA—ADMINISTRATOR—COSTS—
STATUTE OF LIMITATIONS—TIME, HOW IT RUNS.**

HOWLETT v. LAMBERT and others.

The bill prayed an account on foot of two bills of exchange accepted by J. L. deceased, and due and unpaid at the time of his death; and of the costs and expenses incurred by the plaintiff as administrator of J. L., down to the time when the grant of administration was revoked; and that the amount of the bills due to the plaintiff as a creditor of J. L., and of the plaintiff's expenses as administrator might be paid out of J. L.'s personal estate.

The expenses, &c., consisted nearly altogether of the plaintiff's costs in a cause, instituted by him as administrator in 1838, for discovery of assets; which, after issue joined and publication passed, was frustrated by the present defendants, who were also the defendants in that cause, and who being J. L.'s next of kin, and in possession of his assets, for the purpose of avoiding a decree, lodged in the Prerogative Court the will of J. L., which they had previously suppressed, and procured a revocation of the grant of administration to the plaintiff, and a new grant to themselves, *cum testis. annexo*.—They now pleaded the statute of limitations as to the bills of exchange; and demurred generally to so much of the bill as sought an account, &c., of the plaintiff's costs and expenses as administrator.


1. *Held*, that the plea should be allowed; as the plaintiff did not appear to have been under disability, and had not proceeded for his demand within six years after the right of action accrued.—*Semble*, where time has begun to run against a debt in the debtor's lifetime, it does not stop upon his death, but continues to run although there be no representative of the debtor whom the creditor could sue.

2. *Held*, that the demurrer should be overruled; as the costs claimed by the plaintiff were incurred by him not merely in his private right as a party in another cause, but in his official character of administrator; and as the grant of administration to him, though voidable was not void, and conferred on him during its continuance the rights and privileges of a lawful administrator, entitled to be paid out of the personal estate of the deceased the expenses properly incurred in the duties of the office.

3. *Held*, that as the demurrer was overruled, the plaintiff was entitled to the costs of the hearing.

THE bill in this case was filed on the 17th December 1839, on behalf of the plaintiff, and the other creditors of James Lambert, deceased, who should come in and contribute. It stated that the said James Lambert died indebted to the plaintiff as the acceptor of two bills of exchange, one of which was payable on the 30th of June 1828, and the other on the 31st of December 1828; and both of which were due and unpaid at the time of his death in the month of February 1830. That he died unmarried and without issue, leaving three sisters (the defendants), his only next of kin, who neglected to take out administration; and that the plaintiff having waited in vain for some of the family to take out such administration, at length on the 2d of September 1834, issued a citation forth of the Prerogative Court, returnable on the 2d of November then next, requiring the defendants, who were the impugnants in said suit, to introduce and deposit a will, if any such there was, and to accept or refuse the burden of the execution thereof; and in case the said James Lambert died intestate, then to accept or refuse administration as of a person dying intestate; otherwise, to shew cause why letters of administration should not be granted to the plaintiff. That the citation was served on all the parties named therein, on the 26th of September 1834; and that none of them having appeared thereto, or introduced a will of the deceased, the plaintiff became entitled to a grant of letters of administration to the said James Lambert as of a person dying intestate; and in Hilary Term 1835, by the sentence of the Court of Prerogative, such letters of administration were granted

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to the plaintiff, bearing date the 7th of March 1835. That the only personal property to which James Lambert was entitled at the time of his death consisted of a share in a sum of £3000, which had been called in and vested in the name of the defendant Anne Lambert, and of a share of a chattel interest in the lands of Bantry-lodge, in the county of Wexford. That ever since the death of James Lambert, the three defendants, Julia, Anne, and Maria, had been taking the entire rents of Bantry-lodge, and were to be considered as administratrixes of their own wrong in respect thereof. That the plaintiff as administrator filed a bill on the 4th of January 1838, against the defendants, for a discovery of the assets of the said James Lambert, and also for a partition of the interest in Bantry-lodge; and that when the plaintiff's solicitor pressed the defendants for their answer to the said bill, they, for the purpose of baffling the plaintiff in his suit, and in order to evade answering, on the 6th of September 1838, brought in and lodged in the Prerogative Court an instrument purporting to be the will of James Lambert, and refused to answer the bill, upon the ground that they had issued a citation, and were suing to have the letters of administration granted to the plaintiff recalled. That by an order of this Court, on the 17th of November 1838, the defendants were ordered to answer the bill in ten days;* and that they answered on the 29th of November 1838, after which the plaintiff filed a replication, and witnesses having been examined, publication passed on the 12th of June, 1839.

That by a sentence of the Prerogative Court on the 18th of June 1839, the letters of administration theretofore granted to the plaintiff were recalled, and letters of administration, with the will of James Lambert annexed, were granted to the defendants Julia and Anne Lambert, dated the 16th of July 1839; whereby the suit so instituted by the plaintiff as administrator became abated. That being advised he was entitled to the costs incurred by him as plaintiff in said suit to the time of the abatement, and to the expenses incurred by him as administrator, together with the amount of his debt, he caused a notice to be served on the defendants, requiring them to pay the amount of the debt due to him, and of the costs of the proceedings rendered necessary and afterwards unavailable by the fraudulent concealment and subsequent production of the will, and by the revocation of the letters of administration; and that the defendants answered the said notice, and refused to comply with it.

The present bill further stated the will of James Lambert, dated the 15th of June 1817, whereby he directed his debts to be paid, and devised and bequeathed all his real and personal estate to his mother; and in the event of her death in his lifetime, then to his sisters as tenants in common; and appointed his mother sole executrix. That

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she died in the lifetime of the testator ; and that he died, leaving the defendants, his three sisters, surviving him ; and that they were entitled under his will to the same distributive shares as they should have taken in case he had died intestate, and brought it in merely for the purpose of having the grant of administration to the plaintiff revoked, and to prevent him from proceeding effectually against them who were in possession of the assets. That the fact of the existence of the will was well known to the defendants when the plaintiff obtained administration to James Lambert, as to a person who died intestate ; and that the will was given by the defendants, or one of them, to Fletcher and Roe, their solicitors, on or about the 5th of January 1835, as appeared by a memorandum on the back of it.

The bill then prayed that an account might be taken of the debts due to the plaintiff as a creditor of James Lambert, on foot of the said two bills of exchange, and also of the costs and expenses incurred by the plaintiff as administrator of James Lambert, prior to the time when the defendants obtained administration with the will annexed ; and that the same might be paid out of the personal estate of James Lambert ; and that the said personal estate might be applied in payment of the plaintiff and the other creditors of James Lambert, who should come in and prove their debts under the decree ; and that the share or proportion of the leasehold interest to which the said James Lambert was entitled might be sold, &c.

The defendants pleaded the statute of limitations to so much of the foregoing bill as sought an account on foot of the bills of exchange—averring that the cause of action accrued above six years before the filing of the bill, &c. ; and demurred generally to the rest, viz., the parts seeking an account of the costs and expenses incurred by the plaintiff as administrator.

Mr. Francis Ball, for the plea and demurrer.—

1. As to the plea :—The bill states that the two bills of exchange fell due respectively on the 30th of June 1828, and 31st December 1828 ; that James Lambert, the acceptor, died in the month of February, 1830 ; and that the plaintiff obtained letters of administration to James Lambert in March 1835. The bill further states, that ever since the death of James Lambert, the three defendants, his sisters, have been taking the entire of the rents of Bantry-lodge, and are to be considered as executors of their own wrong in respect thereof : consequently, the plaintiff may have sued them at any time after the death of James Lambert. *Webster v. Webster* (a). But it is now clearly established, that where time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which

may elapse between his death and the time at which a personal representative to him is raised. *Rhodes v. Smethurst* (a); *Freake v. Crane-feldt* (b). Therefore, in December 1834, the statute of limitations had run against both the bills of exchange; and the trust in James Lambert's will for payment of his debts did not prevent the operation of the statute, as this is personal estate. *Freake v. Crane-feldt*; *Scott v. Jones* (c); *Erans v. Tweedy* (d). It could not be contended that the debt previously barred by the statute was afterwards set up by a grant of administration, which grant was void (e). It is stated that the defendants suppressed the will, and that they were aware of its existence on the 5th of January 1835, but at that date the plaintiff's demand had been barred; and even if it had not, he could not raise an equity upon the suppression as alleged, for it is not stated to have been for the purpose of preventing him from recovering his debt, and it appears that the defendants had no interest in producing the will, as their rights would have been the same upon the intestacy of James Lambert as under his will. *Fellowes v. Lord Gwydyr* (f). Therefore, the plea must be allowed.

2. As to the demurrer:—The costs claimed by the plaintiff are the costs of taking out administration, and of his proceedings in the cause instituted by him in January 1838, for discovery of the assets. When the grant of administration was revoked by the Court of Prerogative, the question as to the plaintiff's costs of obtaining letters of administration, &c., was then before that Court, and adjudicated upon. The only other costs in question are the costs of the abated suit. The plaintiff had no right to institute that suit; the grant of administration to him was void; and shortly after he had filed the bill, the defendants brought in, and lodged in the Prerogative Court, the will of James Lambert, and issued a citation to the plaintiff to recal the grant of administration obtained by him. Therefore, nearly all the costs were incurred by him with full notice that he had no right to incur them, and that the proceedings in that cause must be unavailing. This Court would not entertain an original bill merely for the costs of an abated suit. *Jupp v. Gearing* (g); *Gibson v. Lord Cranley* (h); *Roberts v. Roberts* (i); *Yarnall v. Rose* (k).

Mr. Thomas Kennedy and Mr. Collins, Q. C., for the bill.

1. The plea is bad. The citation issued by the plaintiff was tested the 5th of September 1834, and served on the defendants on the 26th of September 1834, and returnable on the 2d of November following.

(a) 4 Mee. & Welsb. 42.

(c) 4 Cl. & Fin. 382.

(.) 1 Wms. on Executors, 400.

(g) 5 Mad. 375.

(i) 1 Sim. & Stu. 39.

(b) 3 My. & Cr. 499.

(d) 1 Beav. 57.

(f) 1 Sim. 63.

(h) 6 Mad. 365.

(k) 2 Keen, 326.

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Under the circumstances detailed in the bill, the grant of administration to the plaintiff should be referred back to the date of the citation, so as to give to the plaintiff within the six years a new right upon which the statute ceased to run. *Hovenden v. Lord Annesley* (a); *South Sea Co. v. Wymondsell* (b); *Brooksbank v. Smith* (c). This Court is not bound by statutes of limitation, though it governs its discretion in analogy to them; and where there is no equitable bar to the plaintiff's demand, equity will not enforce the statute against it, but, if necessary, will restrain the defendant from setting up the statute as a defence in a Court of Law. *Blennerhassett v. Day* (d); *Whalley v. Whalley* (e). Before the grant of administration, the plaintiff could not have proceeded for his demand, as there was no one liable to be sued; and in this Court, the statute of limitations does not run in such a case. *Joliffe v. Pitt* (f); *Anonymous* (g).—[MASTER OF THE ROLLS. Your bill charges, that ever since the death of James Lambert the defendants have been taking the rents and profits of Bantry-lodge, and are to be considered "as executors of their own wrong in respect thereof." Might you not have sued them at any time after the death of James Lambert?]—It is obvious that the allegation just adverted to was made erroneously and through inadvertence: the facts stated do not warrant it; and it appears from the defendants' answer in the abated cause, that they claimed to be entitled to those rents and profits as surviving tenants in common, and took them not as the assets of James Lambert, but supposing them to be their own. It is clearly established that such taking does not constitute an executor *de son tort*. *Femings v. Jarrat* (h). In the case of *Webster v. Webster*, the plaintiff did not proceed until 1804, though it appeared clearly by the bill that the defendant was an executor *de son tort* in 1792, and may then have been sued; but in the present case, the plaintiff had not any opportunity of suing for his demand after the death of James Lambert, until the grant of administration in March 1835. Therefore, the plea should be disallowed.

2. The cases cited in support of the demurrer do not apply. The question here is, whether or not the plaintiff is entitled to have the costs and expenses incurred by him as administrator down to the time of revocation, paid out of the personal estate? The grant of administration to the plaintiff was voidable only, and not void. While it continued unrevoked he was a lawful administrator; all lawful acts then done by him as such administrator are valid; and there can be no doubt that he is equitably entitled to have the costs and expenses which he incurred. This is like the case of a limited administration *pendente minoritate* or

(a) 2 Sch. & Lef. 637.

(b) 3 P. Wms. 143.

(c) 2 Y. & Col. 58.

(d) 2 Ball & Beat. 118.

(e) 3 Bligh, 12.

(f) 2 Vern. 694.

(g) 1 Vern. 73-4; 1 Eq. Cas. Ab. 305, pl. 11.

(h) 1 Esp. N. P. C. 335. Swinb. p. 4, s. 2.

pendente lite, in which the administrator has not been reimbursed for his expenses, and has a clear right of suit. *Nash v. Dillon (a)*. The defendants permitted the plaintiff to continue as administrator for upwards of four years. In the suit which he instituted for discovery of the assets, they were the accountable parties, and of course interested in preventing any account. They delayed it by every contrivance, and finally, after the Court had made an order upon them with costs, obliging them to answer—after issue had been joined and publication passed, and when the plaintiff was on the eve of having a decree—they brought in the will, and had the grant of administration to the plaintiff recalled, whereby the suit for an account of the assets became abortive. If the defendants had not themselves been the parties to account, their course would have been to allow the plaintiff to obtain a decree to account, which they might have prosecuted by means of a supplemental bill.

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Mr. Brewster, Q. C., replied.

The case stood for consideration.

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In this case, the bill is on behalf of the plaintiff and the other creditors of James Lambert deceased, who shall come in and prove their demands under the decree; and prays that an account may be taken of the sums due to the plaintiff on foot of two bills of exchange accepted by James Lambert, and due and unpaid at the time of his death; and of the costs and expenses incurred by the plaintiff as administrator of James Lambert, prior to the time when the defendants obtained administration with the will annexed; and that the amount, when ascertained, may be paid to the plaintiff out of the personal estate of James Lambert, &c. The defendants have demurred generally to so much of the bill as seeks an account and payment out of the personal estate of the costs and expenses incurred by the plaintiff as administrator, and have pleaded the statute of limitations as a bar to the demand on foot of the bills of exchange.

1. The following are the facts, as they appear upon the pleadings, material to the question raised by the demurrer:—James Lambert having no real estate, but being possessed of personalty, made a disposition of it by will, and thereby appointed his mother, Beguet Lambert, sole executrix. She died in the lifetime of the testator, and he died without appointing another executor. The defendants, who are the three sisters and next of kin of James Lambert, are entitled under his will to the same distributive shares of his property as they should have taken upon his intestacy; and it is a very material fact in this part of the

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case, that they being fully aware, and in possession of the will, and of the assets of the testator, neglected to take out administration or lodge the will within a reasonable time; and in September 1834 (nearly four years after the death of the testator), when cited by the plaintiff claiming as a simple contract creditor of James Lambert, they did not appear, nor give any notice of the will (which contains a direction for payment of debts), but, by their wilful default, permitted him to obtain from the Prerogative Court letters of administration, bearing date the 7th of March 1835, of the personal estate and effects of James Lambert, as of a person who died intestate. The plaintiff, having thus obtained the grant of administration, and being allowed to continue as administrator, unquestioned by the defendants, for upwards of three years, in January 1838, as administrator, filed a bill against them for discovery of the assets of James Lambert; and not until September 1838, when pressed for their answers, did they lodge in the Ecclesiastical Court an instrument purporting to be the will of James Lambert; and then refused to answer the bill, upon the ground that they had lodged the will, and were suing to have the grant of administration to the plaintiff revoked. They were, however, peremptorily ordered to answer the bill; and on the 18th of June 1839, after issue had been joined, and witnesses examined, and publication passed, the grant of administration to the plaintiff was revoked at the suit of the defendants; to whom, on the 16th of July following, the administration *cum testamento annexo* was committed. Thus the suit instituted by the plaintiff as administrator became abated and abortive, and he now asks that the costs which he incurred in that cause, shall be paid out of the personal estate of James Lambert.

For the demurrer, it is insisted that the grant of administration to the plaintiff was void; and that even if it was not, this Court would not entertain an original bill for costs incurred by the plaintiff in an abated cause. As to the first point, it is material to consider the difference between grants of administration which are absolutely void, and those which are voidable only. It has been determined, that if the Ordinary grants administration of effects not within his jurisdiction, the grant is absolutely void; but if, the effects being within his jurisdiction, he commits the administration to a wrong person, the grant, though voidable—that is, although it may be revoked and determined at the suit of the person having the superior right—is not void, but valid until revoked. In the present case, the sole executor named in the will died during the lifetime of the testator. The next of kin, who were entitled, as legatees under the will, to the whole of the testator's property, subject to his debts, and would have been equally entitled upon his intestacy, withheld the will;—at least, they did not lodge or give any notice of it, although in their possession; and their conduct amounted to a refusal to administer. It is impossible to avoid perceiving the very

obvious though not very equitable reasons which there were for the course they adopted ; and I am clearly of opinion that the grant of administration to the plaintiff, although voidable, was not void ; that the Prerogative Court had complete jurisdiction to make it ; and that it invested him for the time with the rights and powers of a lawful administrator, whose lawful acts should remain valid and effectual ; and entitled him to be paid, out of the personal estate of the deceased, the costs and expenses properly incurred in performing the duties of the office. It is stated in the bill that the defendants interfered with the assets, and that they are to be considered as executors of their own wrong ; but I do not see that this makes any difference, as when called on to produce the will, and to administer, they declined to do so. In *Doyle v. Blake (a)*, Lord Redesdale said, "That it was true, an executor having acted, could not discharge himself from liability by the administration being granted to another ; but that a debtor to the fund could not, in answer to a suit by such administrator, set up the act *in pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. That the administration was void, only as a protection to the executor, but in no other sense." In *Rolle's Abridgt. tit. Executor (b)*, it is laid down, that if an executor acts without probate, and afterwards refuses to prove the will and to administer when required by the writ of the Ordinary so to do, the Ordinary may commit the administration to another ; and from the case of *Jackson v. Whitehead (c)*, it appears that even after an executor has taken the oath of office and given an appearance as executor in a cause touching the validity of the will, the Ordinary may accept his renunciation. In *Blackborough v. Davis (d)*, Holt, C. J., lays down the law thus :—"Though the Ordinary be restrained by statute to grant administration to the next of blood, yet he is not so restrained as to make an administration granted by him, though contrary to statute, a mere nullity ; for if such administration were void, then all dispositions of goods of the intestate, pending the administration and before the repeal of it, would be void also ; and after it was repealed, *trover* would lie for these goods, which cannot be." He adds, "If an administration committed to a creditor be afterwards repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator ; and all dispositions made by him pending the citation shall stand." From these authorities it is clear, that although an executor who has once acted by meddling with the assets, cannot by subsequent renunciation, or the grant of administration to another, be divested of the liability of an executor ; yet, if when required to prove the will and

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(a) 2 Sch. & Lef. 237.

(b) Sect. (c), pl. 2, p. 907.

(c) 3 Phillim. 577.

(d) 1 P. Wms. 41-44 ; and Salk. 38.

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administer, he refuses to do so, the Ecclesiastical Court may commit the administration to another, who will, so long as the grant continues, be to all intents and purposes a lawful administrator, whose lawful acts shall remain valid and effectual, though the grant of administration be afterwards revoked.

I take it, then, that the plaintiff was clearly entitled as administrator to file the bill for discovery and account against the defendants, and under the circumstances which have been disclosed, I will not question the propriety of his doing so. Had that cause been prosecuted, he must certainly have had his costs; and I would be very sorry to hold, that an administrator who properly institutes a suit in the performance of his duty, is to be disentitled to the costs which he incurs in it, because on the eve of a decree, the defendants who happen to be the next of kin of the deceased, in possession of his assets, and the parties to account, procure the grant of administration to be revoked, and obtain a new grant to themselves, for the mere purpose of avoiding the proceedings which it was their duty as administrators to have upheld. The bill now before the Court is, I think, not to be considered as seeking the costs incurred by the plaintiff in his private right as a party in another cause, but the costs which he incurred as administrator in the performance of his duty. My order, therefore, is, that the demurrer be overruled.

2. The remaining question is that raised by the plea.—I need scarcely premise that the trust for payment of debts, already adverted to, can have no effect upon this question; as the bill states, that James Lambert had no real estate, and his will was a disposition of personalty only. We are all familiar with the recent determination of the House of Lords on appeal in *Scott v. Jones (a)*, and the still more recent decisions of the Court of Chancery in England upon the same subject; by which it is now finally settled that in a will of personalty, a trust for payment of debts cannot save them from the operation of the statute of limitations. The facts, then, on which the present question arises, and the plea relies, are these:—The plaintiff's right of action on the bills of exchange, the amount of which he now seeks to have out of the personal estate of James Lambert, accrued to him immediately after the 30th of June and 31st December 1828, when the bills were respectively due and unpaid. James Lambert, the acceptor, was then alive, and so continued until the month of February 1830, when he died, leaving the bills, on which no proceedings had been taken, still due and unpaid. It does not appear that when the right of action accrued, or from thence during the lifetime of the debtor, the plaintiff was under any disability which could have prevented his proceeding upon the bills; and, I must take it that the time of limitation began to run in the lifetime of

(a) 4 Cl. & Fin. 382.

the debtor, from the period at which the right of action accrued. After the death of James Lambert, the plaintiff still lay by until the month of September 1834, when he issued a citation from the Prerogative Court, but did not obtain the grant of administration until the 7th of March 1835, at which date more than six years had elapsed after his right of action had accrued upon the bills of exchange. The question then is,—is not his demand barred by the statute of limitations? I will not say that it is absolutely barred; because I will not say that the bill may not be amended in such a way as to avoid the statutory bar. Whether the bill could or could not be so amended, I do not now give any opinion, as the question is not before me; but as the case at present stands, I must allow the plea: for, the bill charges that “since the death of James Lambert, the defendants have received the entire rents and profits of Bantry-lodge, and are to be considered as executors of their own wrong in respect thereof;” so that, according to the plaintiff’s own statement, he may have brought his action at any time within the six years; and the case comes exactly within the authority of *Webster v. Webster* (a). Even if the defendants should not be considered as executors of their own wrong, my decision must be the same: for the time began to run against the plaintiff’s demand in the lifetime of James Lambert; there does not appear to have been anything which would have prevented the plaintiff from obtaining the grant of administration a year or two earlier than he did; and it has been decided in *Rhodes v. Smethurst* (b), and *Freaker v. Crane-feldt* (c), that when time begins to run in the debtor’s lifetime, it does not upon his death stop until his personal representative is raised, but still runs on. I allow the plea with regret, as the plaintiff’s demand seems to be a fair one; but, for the reasons I have stated, I feel bound to do so. However, as the defendants have failed on the demurrer, they must pay to the plaintiff the costs of the hearing.

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(a) 10 Ves. 93.

(b) 4 Mee. & Welsb. 42.

(c) 3 My. & Cr. 499.

Saturday, May 9th.

INFANT—APPOINTMENT OF RECEIVER AND
GUARDIAN.

In re CORMICKS, Minors.

Where upon petition of the paternal aunt of the minors it appeared that their mother was dead, and that their father was still living, but was a man of irregular habits, and had lately intermarried with a person who had been formerly his servant, the Court granted the prayer of the petition; and accordingly referred it to the Master to appoint a receiver of the minors' estate, and also to inquire and report as to proper maintenance to be allowed, and whether or not it would be proper to appoint guardians of their persons and fortunes.

THE petitioner in this matter was the paternal aunt of the minors. Her affidavit stated that one Isabella Tylor being seized of a moiety of certain lands in the county of Mayo, held under leases for lives renewable for ever, by her will devised them to the use of her niece Elizabeth (the mother of the minors) for life; remainder to the first and other sons of the said Elizabeth, according to priority, and their issue male; remainder to the said Elizabeth and her heirs, for ever. That the testatrix empowered her said niece, so long as she should remain unmarried, to lease any part of the said lands for any term not exceeding three lives or thirty-one years, at the best rent; and further, in case her said niece should marry with the consent of three persons named in the will, to settle a life interest in said lands on such husband as she should marry, and to charge the said lands with such provision for younger children as the testator's three friends (named in the will) should think reasonable.

That the said Elizabeth intermarried with the petitioner's brother in 1826, but that no settlement was made either before or after said marriage. That there was issue of the marriage two daughters and one son (the three minors). That shortly after the birth of the eldest minor, she was taken, with the consent of her father and mother, by her grandmother and petitioner, with whom she had ever since lived, and by whom she had been maintained and educated. That the second girl and the boy lived with their mother until her death, which happened in the year 1838; and that for two years before her death the minors' mother had lived apart from her husband, in consequence of differences arising out of his ill temper and dissipated habits. That upon her death, the petitioner took the second girl, and had since maintained and educated her; and that the father (who had lately, in a state of intoxication, married a girl, formerly a servant of the minors' mother) took the boy, now seven years old, and kept him from July 1838 to June 1839, during which time the child was totally neglected;—kept without proper clothes;—allowed by his said father to go bare-footed about the country, and frequently, to spend the night in open boats at sea with fishermen. That in June 1839, the petitioner took the child from his father, and since kept and took care of him. That the profit-rents of the lands devised by Mrs. Tylor amounted to about £150 per annum, and that the father and mother of the said minors had, before their separation, let part of the said lands at a gross undervalue; and that the only independent property of the father produced not more than £50 per annum.

The petition further stated the particulars of the minors' property, and who were their nearest relatives, maternal and paternal; and prayed that it might be referred to one of the Masters to appoint a guardian or guardians of their persons and fortunes; and to inquire and report whether or not it would be for their benefit that a receiver should be appointed, &c.

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Mr. *Walter Bourke* now moved the prayer of the petition, and read an affidavit of the personal service upon the father of the minors and their relatives mentioned in the petition, of the Lord Chancellor's order directing all parties mentioned in the petition to attend upon this day, and that notice should be given to them forthwith. However, there was not any appearance on their part.—Counsel referred to the cases of *Kiffin v. Kiffin* (a); *De Manneville v. De Manneville* (b); *Whitfield v. Hales* (c); *Mountfort, Ex-parte* (d); *Myerscough, Ex-parte* (e); *Wellesley v. The Duke of Beaufort* (f); *Ball v. Ball* (g).

The MASTER OF THE ROLLS said there was no doubt that he might make the order sought.

ORDER:—Let it be referred to Master Goold to approve of a fit and proper person to be appointed receiver* in this matter of the lands and premises in the petition mentioned to have been devised by the will of Isabella Tylor, that is to say, a moiety of the town and lands of, &c., upon his entering into security by recognizance conditioned to account as in such cases; and let the said Master inquire and report the respective ages of the said minors, and the amount and value of their respective property, and what would be a proper sum to be allowed for their maintenance, clothing, and education; and the funds applicable to pay the same; and to whom the maintenance ought to be paid, having regard to the circumstances stated in the affidavit of the petitioner; and let the father of the said minors have notice of the proceedings under this order; and let the said Master inquire and report whether it will be fit and proper, and for the benefit of the said minors, or any and which of them, that a guardian of their persons or fortunes should be appointed; and if so, let him state the special circumstances which render such appointment proper; and the Court reserves further directions until the return of the report.

(a) 1 P. Wms. 705. (b) 10 Ves. 52. (c) 12 Ves. 492. (d) 15 Ves. 447.
(e) 1 Jac. & Walk. 151. (f) 1 Russ. 1; 2 Bligh, N. S. 124. (g) 3 Sim. 35.

* By the 4 & 5 W. 4, c. 78, s. 7, it is enacted, that the Court may on petition appoint a receiver of the real and personal estate of a minor or minors, without a bill being filed for that purpose.

Monday, May 11th.

INJUNCTION—INFRINGEMENT OF COPYRIGHT—LAW REPORTS.

JOHN HODGES and GEORGE SMITH v. THOMAS WELSH.

Law Reports are to be considered (as to copyright) as any other literary work.

Whether certain cases in the Law Reports may be reprinted at length in a treatise on the particular subject to which they relate, *quære*.

But it is piracy to collect together and reprint from the Law Reports all the cases upon a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions and notes.

This Court will interfere by injunction to protect the copyright of the assignee of the author, though it appears that at the time of the alleged piracy there was not an assignment in writing, and the assignee had a merely equitable title.

This Court would disregard a permission from the author to infringe the copyright, given after he had

THIS case was first mentioned on the 4th instant, but, in consequence of an application then made on behalf of the defendant Mr. Welsh, it was ordered to stand over until this day, in order to give Mr. Welsh the opportunity he desired of making an affidavit in answer to some of the statements contained in the plaintiffs' affidavit.

The plaintiffs' bill and affidavit, filed the 1st May 1840, stated that at different times between the 1st of January 1838, and 10th of March 1839, several literary works, being respectively parts of the first volume of a work entitled, "*Abridged Notes of Cases argued and determined in the several Courts of Law and Equity in Ireland, during the years 1837 and 1838, with some Decisions at Nisi Prius, and on the Circuits,*" were for the first time printed and published; and that *George Crauford* and *Edward Spencer Dix* were the authors of the said literary works, and the original proprietors of the copyright of the same. That at different times between the 1st of June 1839, and 1st of March 1840, two several books, being respectively the first and second parts of the first volume of a certain other work, entitled, "*Reports of Cases argued and ruled on the Circuits in Ireland,*" were for the first time printed and published; and that the said *George Crauford* and *Edward Spencer Dix* were also the authors of the said last-mentioned books, and the original proprietors of the copyright of the same.

That at the several times when the said works were printed and published respectively, an agreement had been made and was subsisting between the plaintiffs and *Crauford and Dix*, whereby, in consideration of certain monies from time to time to be paid by the plaintiffs to them, it was agreed that the copyright of and in the several literary works, and all profits, &c. to arise from printing and vending the same, should belong to and be vested in the plaintiffs. That in performance of the said agreement, the plaintiffs did from time to time in the years 1838, 1839, and 1840, pay unto the said *George Crauford* and *Edward Spencer Dix* large sums of money, amounting in the whole to, &c., in consideration of their copyright of and in the said several works; and that in order to effectuate and carry the said agreement into execution, a deed or instrument in writing, bearing date the 22d of April 1840, was made and executed by and between *Crauford and Dix* of the one part, and the plaintiffs of the other part, whereby the copyright of and in each and every of the said works herein before mentioned were parted with his equitable title for valuable consideration, and it had appeared upon the title-page of his work that it was printed for the equitable assignee of the copyright.

assigned by *Crawford and Dix* for the considerations aforesaid, to the plaintiffs, in virtue of which the copyright of and in the said several works, and all profits, benefits, and advantages to arise from printing and vending the same, became and were legally vested in, and now belonged to the plaintiffs.

That the copyright in the said several works was still subsisting and unexpired; and that by virtue of the several acts of parliament now in force in Ireland, the plaintiffs alone had the sole and exclusive right of printing and reprinting the said several works; and that no consent in writing or otherwise had been given by the plaintiffs or either of them, authorising any person or persons to print or reprint, or cause to be printed or reprinted the said several works, or any parts or part of them, or any of them. The plaintiffs farther stated that no consent in writing or otherwise had been given by *Crawford and Dix*, or either of them, authorising any person or persons to print or reprint, &c.; and that the plaintiffs well hoped they should have been permitted to print, publish, and sell, &c. without molestation.

That the defendant had lately caused to be printed, and on or about the 4th of April 1840, for the first time, published, and had since caused to be exposed for sale, and had sold, and caused to be sold, divers copies of a certain book, entitled, "Registry Cases, comprising all the published, and many of the recent unpublished Decisions in Ireland, respecting the Registration of Voters, under the Irish Reform Act, and 10th G. 4, c. 8; with an Appendix," containing, in full, the above Statutes, and the Provisions of all the Stamp Acts relating to Instruments required to be produced at Registry. By Thomas Welsh, Esq., "Barrister at-Law." That a great part of the last-mentioned book had been copied and pirated by the defendant, without the consent of the plaintiffs or of any person duly authorised, from the several works before-mentioned, the copyright of which was vested in the plaintiffs.

That the book so printed and published by the defendant consisted in the whole of 285 pages, exclusive of the Title-page, Preface, Appendix, and Table of Cases, and contained 94 reports* or statements of legal cases judicially decided. That 37 pages of the said 285 pages had been copied from, or composed and made up of parts of the said several works, the copyright of which was so vested in the plaintiffs; and that 23 of the said 94 reports or statements of cases had been copied from the plaintiffs' said several books, with some trifling alterations, which, the plaintiffs charged, were unimportant and colorable only; and the plaintiffs further charged, that the 23 cases so copied or taken from their said several books were not fairly abridged in the said book or work so printed and published by the defendant. That the following parts of the defendant's book had been copied, transcribed, or taken

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* *i. e.* Principal cases in the text; there were, however, five or six-and-twenty other cases given in the notes.—See *post*, p. 274.

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from the said several works, the copyright of which was vested in the plaintiffs: that is to say, one page, containing the case of *In re Garrett*, one page, containing the case *In re Baile*; two pages, containing the case *In re Colles*; one page and a-half, containing the case *In re Dowling*; two pages, containing the case of *Regina v. Lennon*; one page and a-half, containing the case *In re Ottiwell*; two pages, containing an *Anonymous* case; all of which said several cases had been copied, transcribed, or taken from the said first volume of the said work entitled, "Abridged Notes of Cases," &c.; also the following pages and cases from the first and second parts of the said work entitled, "Reports of Cases argued and ruled on the Circuits in Ireland;" that is to say, one page, containing the case *In re Cassan*; one page and a-half, containing the case *In re Bergin*; one page and a-half, containing the case *In re Armstrong*; one page and a-half, containing the case *In re Maurice Farrell*; one page, containing the case *In re Cooke*; one page, containing the case *In re Bingham*; one page, containing the case *In re Duigan*; one page, containing the case *In re Watson*; one page, containing the case *In re Druitt*; two and a-half pages, containing the case *In re Neale*; one page and a-half, containing the case *In re M'Cann*; seven pages, containing the case *In re Aylward*; one page, containing the case *In re Abin*; half a page, containing the case *In re Foster*; two pages, containing the case *In re Taylor*; and three pages, containing the case *In re Barber*;—making altogether 23 cases, and 37 pages.*

That in the said work entitled "Abridged Notes of Cases," &c., were contained notes of cases, entitled, "Points ruled by DOHERTY, C. J., at "the Queen's County Summer Assizes of 1835," which said notes are contained in four pages of the said work, viz., pages 509, 510, 511, and 512; and that all the material and substantial parts thereof had been extracted and transcribed into pages 23, 73, 113, 128, 157, 226, 271, and 283 of the defendant's book. That the said defendant had sold, or caused to be sold, great numbers of copies of his said book, and had, as the plaintiffs believed, received large sums of money in respect of such sales, and that large sums of money were still due to him in respect of such sales. That the copyright of the several works so vested in the plaintiffs had been pirated, and infringed by the conduct of the defendant; and that many persons, who were or might be employed or interested in or about the registration of voters for Members to serve in Parliament, had been and would be induced to abstain from purchasing the plaintiffs' books by reason of the publication and sale of the defendant's; and that the publication and sale of the defendant's book had caused, and was likely to cause, great loss and damage to the plaintiffs, and injured the sale of the said works, the copyright of which was so vested in the plaintiffs, and tended to deprive

* In the above statement the Reporter has, for the sake of brevity, departed a little from the form of the pleading, in which each case was severally referred to the volume or part of *Crawford and Dix* from which it had been extracted.

the plaintiffs of the benefit of their said copyright, and of the profits, emoluments, and advantages they should otherwise have derived, and should have afterwards derived therefrom.

That for some short time after the publication of the defendant's book,—that is to say until about the 14th of April 1840,—the plaintiffs were not, nor was either of them, aware of the nature and contents of the said book; but as soon as they, or either of them, became aware that parts of the said book were copied, transcribed, or taken from the said works, the copyright of which belonged to them, they immediately complained of the said piracy, and wrote and sent to the said defendant a letter in the words or to the effect following:—"21, College-green, 15th April 1840. Sir, inasmuch as you have cause to be printed and published a collection of reports of decisions of the Judges upon points connected with the registry of voters in Ireland; and as many of the reports so printed and published have been extracted from the reports of Messrs. *Crawford and Dix* (the copyright of which is vested in us), without our leave or permission: take notice that you are hereby cautioned not to sell, or allow to be sold, any copy or copies of the work so printed and published by your authority as aforesaid; and that in case you shall sell or allow to be sold any copy or copies of the said work, this notice shall be used for the purpose of charging you with the costs of any proceeding or proceedings which we shall institute or cause to be instituted against you for such printing and publication, or sale, as aforesaid.—We are, Sir, your obedient servants, *Hodges and Smith.* To *Thomas Welsh, Esq.*"

That on the 22d of April 1840, they gave instructions to their solicitor to take proceedings for their relief in the premises; and that on the 23d of April 1840, they commenced an action at law against the said defendant in her Majesty's Court of Queen's Bench in Ireland, for the purpose of recovering compensation from the said defendant for the damage they sustained by the said piracy and infringement of their copyright, which said action was still depending; and as evidence thereof, the plaintiffs shewed that they had caused to be issued out of the said Court, her Majesty's writ of *capias ad respondendum*, at the suit of the plaintiffs against the said defendant, tested the 15th day of April, in the third year of the reign of her present Majesty, whereby the said defendant was required to appear to the said action on the 27th day of April, instant; and that the said writ was duly served on the said defendant on the 23d April 1840.

And as evidence that the said several cases herein before mentioned had been respectively copied, transcribed, or taken from the said several works, the copyright of which was vested in the plaintiffs; the plaintiffs charged that at the conclusion of each and every of the said several cases in the defendant's said book, there was a reference to the page in the plaintiffs' said books, which contained a case, or commencement of a

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case, substantially and in all material respects the same as the case so given in the defendant's book; and the plaintiffs further referred to the title-page of the defendant's said book, whereby it was stated to comprise all the published decisions in Ireland respecting the registration of voters under the Irish Reform Act, and 10th G. 4, c. 8.

That the defendant never did at any time, previously to the publication of his said book or work, acquaint the plaintiffs or either of them with his intention of printing and publishing the said several cases before mentioned, or any of them, although all and every of the said works, the copyright of which was vested in the plaintiffs, were and was upon the title-pages thereof, respectively advertised and stated to have been printed for the plaintiffs, whereof the defendant had notice. That the defendant had caused his said book to be printed and published, as the plaintiffs had heard and believed, at his own expense, in order to sell and dispose of the same for his own benefit, and thereby deprive the plaintiffs of the benefit and advantage of their copyright, &c.; and the plaintiffs referred to the title-page of the defendant's said book, wherein it was stated that the defendant was the author, and that it was printed for the author by Pettigrew and Oulton, 36 Dame-street; which said Pettigrew and Oulton had been and were, as the plaintiffs believed, the agents of the defendant for the printing, publication, and sale of the said book; and as evidence thereof the plaintiffs stated, that on the 29th of April 1840, a copy of the defendant's said book or work had been purchased by John Barry, by the directions of the plaintiffs, at the shop of the said Pettigrew and Oulton. That the defendant had, as the plaintiffs believed, sold and disposed of a great number of copies of his said book to different booksellers in Ireland to sell for his benefit; and that since the assignment of the copyright in the said first mentioned works to the plaintiffs, the said book or work so printed and published by the defendant had continued to be sold, and was sold, at the shop of the said Pettigrew and Oulton.

The bill prayed that the defendant might be decreed to account for and pay to the plaintiffs all such gains and profits as had accrued or arisen, or had been or might be got in and received by him, or by any person in trust for him or for his use, by the printing, publication, and sale of the said work so printed and published by him as aforesaid; and that he should be ordered and decreed to deliver up to the plaintiffs all copies of his said work which were now in his custody or power; and for an injunction to restrain the further sale or other disposal of the said work; and for the costs of this suit, &c.; the plaintiffs waiving all penalties.

*Defendant's
Affidavit.*

The defendant by his affidavit admitted, that he was the author of the said book in the plaintiffs' affidavit mentioned, and that he had published and sold, and caused to be sold, the said book or work. That his object

and intention in publishing the said work was, that it should contain in a succinct form, the existing registry law in Ireland. That he intended by compiling and arranging all the existing decisions upon the subject, not merely to set forth that such cases were decided, but by contrasting and collating them with other cases and decisions, and affixing such notes as he thought necessary, to shew how the law really stood upon authority. That he had pursued this intention; and that in his said work he had set forth, as he believed, the existing state of the registry laws in Ireland, so as to enable any person interested in the subject to ascertain without difficulty, whether any point he might have occasion to consider had been the subject of judicial decision, and if so, whether the decisions upon it were uniform or contradictory. That whenever it was necessary to append to any case notes or observation for the purpose of either referring to other cases, or of elucidating the subject, the deponent always appended such note; and that wherever he left any case or cases without note or remark, it was because he believed that such case or cases had not been overruled or questioned, and that the same contained within itself or themselves the present state of the registry law in Ireland as it stands upon judicial decision.

That his purpose in publishing the said book was for the ease and convenience of practitioners in registry cases, and to draw the attention of professional men and of the public to the anomalies existing under the registry laws as they at present stand upon the acts of parliament, and the conflicting judicial decisions made thereon; and that he then and still believed that any work which classified and arranged materials so scattered as the registry decisions were, would be productive of many and most useful results to the public as well as to the legal profession. That he never intended to deprive the plaintiffs, or any other persons, of any profit or advantage they might have from *Crawford's and Dix's Reports*; and that in no instance did he use a colorable abridgement, or otherwise set forth any case in a manner to conceal an unlawful or unfair intention. That it was not with the expectation of pecuniary gain that he undertook the preparation of his said book; but believing it to be a legitimate undertaking for a barrister, and likely to be of public utility. That he understood and submitted it had been a practice at all times recognised, to extract cases from general law reports, as well as particular acts of parliament, in order to illustrate any particular subject of law; and that such usage was essential to public utility, and the advancement of legal knowledge. That it was well known to the members of the Bar, as deponent believed, that many of the cases in *Crawford's and Dix's Reports*, were not reported or prepared by them, but by other gentlemen, by whom they were given to *Crawford and Dix* for the sake of public utility, and not for their own benefit; but how, or in what manner the said cases were given, or

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how the said *Crawford and Dix* became the authors of, or obtained the copyright in the same was unknown to this deponent, and was not disclosed in the plaintiffs' affidavit. That some of the cases in the said reports of *Crawford and Dix* were professedly given *ex relatione*; and that to the first case in the second part of the said reports of *Cases on the Circuits*, the following note was appended:—"Reports of this and the following sixty-three cases (ending with that of *Rex v. Conyngham*) are contained in the first edition of *Mr. Hayes' Digest of the Criminal Law of Ireland*; but they are now, at the desire of Mr. Hayes, republished in this collection, in order that in the second edition of that work, they may be referred to without being embodied therein." That *Crawford's and Dix's* said *Circuit Cases* purported to include cases occurring upon all the six Circuits; but that *Crawford* attended upon the Home Circuit only, and *Dix* upon the North-East Circuit only; and that it did not appear from the plaintiffs' affidavit how the said *Crawford and Dix* became the authors of the cases occurring upon the other four Circuits, or were entitled to any property or copyright therein. That the cases *In re Farrell*, and *In re Aylward*, by the plaintiffs mentioned, were given by *Crawford and Dix* as cases from the Leinster Circuit. That their said Reports contain in the whole 768 cases, and that the plaintiffs had not alleged that more than 23 of them were contained in deponent's said book.

That the only case that was *verbatim* the same as in the Report of *Crawford and Dix* was the case *In re Abin*, which deponent admitted he had copied from the Report of *Crawford and Dix*, but utterly denied that he had done so with any piratical intention. That he had done so with the purpose (which, as he submitted, was fully explained in his note to the said case) of shewing that it could not be considered as concluding the question to which it related, by contrasting it with other and contrary decisions. That *Crawford and Dix's* Report of the case *In re Armstrong* omitted a decision in that case which was opposed to the decision *In re Abin*; and that as deponent had procured the full and accurate report of *Armstrong's* case, contained in his said book, he was anxious that a full report of *Abin's* case should appear in contrast with it, that the contradiction between the two decisions might be manifest. That the case *In re Aylward*, occurred at Waterford, which is not upon the Circuit of either *Crawford* or *Dix*, and was reported by them *ex relatione*. That their Report of Mr. Justice PERRIN's judgment in that case was, as deponent had heard and believed, a reprint from a Cork newspaper called *The Southern Reporter*; that deponent had seen the number of the said paper, dated the 19th of October 1839, in which said Report appeared, and also a paper writing in the hand-writing of Mr. Justice PERRIN, indicating some necessary corrections of the said

newspaper report. That, as deponent had heard and believed, Mr. Justice PERRIN was applied to for the notes of his said judgment, not only by Messrs. *Crawford and Dix*, but also by Mr. *Alcock*, who was in the habit of editing registry cases; and that the said learned Judge furnished his notes accordingly, and at the same time directed that they should be freely communicated to any gentleman engaged in such publications. That *Crawford's and Dix's* report of the case appeared to be an exact reprint of the newspaper statement, with such alterations only as were indicated by the note of the learned Judge.

That it was not true, as alleged in the plaintiffs' affidavit, that no consent in writing or otherwise had been given by the said *Crawford* or *Dix*, or either of them, authorising any person to print, reprint, or cause to be printed or reprinted, the said therein-before-mentioned several works, or any part thereof; on the contrary, deponent stated, that on or about the 1st of February then last past, and long before the publication of deponent's said book, deponent met *Crawford and Dix* walking in Grafton-street, &c. &c.—[The affidavit here stated minutely the conversation which ensued, in the course of which the deponent received, as he supposed, a distinct license from Messrs. *Crawford and Dix*, "to use as he pleased any cases reported by them;" also a subsequent conversation between deponent and Mr. *Dix*, tending to shew the correctness of deponent's impression of the effect of the previous conversation.]—That deponent's application to *Crawford and Dix* was not in consequence of his supposing that he was bound by law to obtain or ask their sanction, but was intended merely as a matter of courtesy towards professional brethren.

Messrs. *Crawford and Dix* made a joint affidavit, in which they deposed that their contract with the plaintiffs, respecting the said several books of reports in the plaintiffs' affidavit mentioned, was truly stated in the said affidavit; that deponents had received the said several sums of money, &c.; and, as they believed, that the said several books of reports had been printed and published at the expense of the plaintiffs exclusively. They admitted the defendant's statement respecting the cases reported by them *ex relatione*, but said that all the manuscripts and notes of the said several cases had been given by the respective owners thereof to deponents for their use and benefit absolutely. That they had expended much time and labour in making up and preparing for publication the said reports *ex relatione*; and that part of the money paid by Hodges and Smith to these deponents was in consideration of the assignment by these deponents to the said Hodges and Smith of the copyright in the said several cases so reported *ex relatione*.

They further admitted their meeting with the defendant in Grafton-street, on or about the 1st of February, and that a conversation ensued respecting the work, upon which the defendant mentioned that he was

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then engaged. But they positively denied that they had given or intended to give any such license as the defendant supposed; and said that they were under the impression that the defendant's work was to be a Treatise on the Law of Registry in Ireland, in which it would be necessary to advert to and observe upon the several reported decisions on the subject; and that if they had been fully apprised of the nature of the defendant's intended publication, they should have referred him to the plaintiffs, to whom the copyright belonged. They further stated that the defendant had, in the manner in the plaintiffs' said affidavit mentioned, extracted or taken out of the said several books of reports edited by the deponents every case relating to the registry of voters for the election of Members to serve in Parliament, therein contained; and that, as they verily believed, the said defendant had, by so doing, greatly injured and lessened the sale of the said reports so edited by the deponents, as they were informed and believed that many persons purchased the said reports solely on account of the cases therein contained respecting the registry of voters.

Mr. *Blackburne*, Q. C., on behalf of the plaintiffs, now moved for an injunction to restrain the defendant and his agents, &c., from selling or otherwise disposing of any copies or copy of his said work entitled "*Registry Cases*," &c.*

There can be no doubt that there is copyright in Law Reports as well

* For the reader who may not have seen a copy of the book which was the subject of complaint in this cause, it may be proper to state, by way of explanation, that it appeared to be nothing more than a volume of Reports confined exclusively to Registry Cases, which were collected and arranged in the volume according to their subjects, with occasional Notes by the Editor. The book contained in all, 120 reports of cases, more than 100 of which appeared to be only restatements of cases previously reported by other persons, whose Reports were referred to at the end of each such statement. In short, the book contained, as its title-page announced, "All the published, and many "of the recent unpublished Decisions in Ireland, respecting the Registration of Voters." In some instances, the restatements were mere repetitions of the original reports; but generally, the restatement adopted a different phraseology, though it adhered strictly to the substance of the report, and very often to its general form and method also. Of the cases mentioned in the plaintiffs' affidavit, the two following, as they appeared in the original Reports and in the defendant's book, have been taken at random:—

Crawford and Dix's Circuit Cases, p. 220.

The defendant's Book, p. 77.

Coram JOHNSON, J.

Coram JOHNSON, J.

In re COOKE.

In re COOKE.

Party claiming to register his vote as a £50 freeholder, appeared at the Sessions, and offered to take the oath in that behalf, but gave no evidence of qualification: Held, not entitled to register.

A £50 freeholder resorting to the Sessions, in the first instance to register his vote, is bound to give evidence of his qualification, if required.

This was an appeal from the decision of the Assistant Barrister who had refused

Appellant had served notice of his intention to register as a fifty-pound freeholder,

as in other literary productions; and that a volume of Law Reports differs from ordinary books in this, that each part of the volume which contains the report of a case, is an independent and entire thing, hav-

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Crawford and Dix's Circuit Cases, p. 220.

The defendant's Book, p. 77.

to register the claimant's vote. It appeared that the appellant had served notice of intention to register as a fifty-pound freeholder, and that he appeared at the Sessions, and claimed to be registered, offering to take and subscribe the oath in that behalf specified by the Statute 2 & 3 W. 4, c. 88; but that he did not produce his title deeds, or any other evidence in proof of his qualification.

W. G. KELLY, for the appellant.

Rejection affirmed (a).

(a) Vide *In re Batley*, 1 *Crawf. & Dix*, Abr. N. C. 512, where it was held, that a fifty-pound freeholder, resorting to the Sessions in the first instance for the purpose of being registered, must establish his claim in the ordinary manner, and that the privilege of registering upon affidavit alone, is confined to those who make the proper affidavit before a Judge; it would seem that the Reform Act has, in some degree, narrowed the privileges of fifty-pound freeholders, for by the preceding Act, 10 G. 4, c. 8, s. 25, fifty-pound freeholders were enabled to register by taking, &c. the oath in the schedule thereto, either before the Assistant Barrister at Sessions, or in any of the superior Courts, or before a Judge at the Assizes, and each such freeholder was thereupon entitled to receive at Sessions his certificate of registry.

Crawford and Dix's Circuit Cases, p. 72.

CORAM TORRENS, J.

IN RE WATSON.

A. and B. were partners in trade; A. resided in a house which comprised a warehouse, in which the partnership business was carried on; the warehouse was common to A. and B., but the remainder of the house was used by A. as a residence, and had a separate entrance used by A. and family only. The house had originally been taken by B., who put A. into possession, and the arrangement between A. and B. was, that the former should have the exclusive occupation of the portion of the house occupied by him as a residence; A. paid no rent to B., but the greater part of the furniture in the apartments occupied by A. were his (A.'s) property: *Held*, that A. having proved value, was entitled to be registered as a £10 householder.

In this case the appellant claimed to be registered as a ten-pound householder for the borough of Carlou, but had been rejected by the Assistant Barrister, upon the

and appeared at the Registry Sessions for that purpose, but did not produce his title deeds, or offer any evidence of the quality or value of his holding. The Assistant Barrister had rejected him upon these grounds.

Mr. Justice JOHNSON concurring, affirmed the rejection. *Craw. & Dix. Rep.* 220 (a).

(a) See *In re Batley*, last page. The 26th section of 10 G. 4, entitled a £50 freeholder to register his vote, by taking and subscribing the oath prescribed, "either before the Assistant Barrister at Quarter Sessions, or in any of the superior Law Courts of Record in Dublin, or before a Judge at the Assizes." The corresponding section in the Reform Act (s. 46) omits the words in the former act, "either before the Assistant Barrister at Quarter Sessions." The above decision, it is presumed, was grounded upon this omission. See, also, *In re Cassan*, ante, p. 17, title *Affidavit*.

The defendant's Book, p. 219.

CORAM TORRENS, J.

IN RE WATSON.

Exclusive occupation by one partner of portion of a house which formed part of the partnership concern, and the rent of which was paid out of the funds of the partnership, constitutes a claim to register as a householder under the Reform Act.

The appellant had claimed to be registered as a £10 householder for the borough of Carlou, and was rejected by the Assistant Barrister, upon the ground that he was not sole tenant or owner of the premises in respect of which he so claimed. The appellant and Crosthwaite were partners in trade; appellant resided in a house, which comprised a warehouse or shop, in which the partnership business was carried on. The warehouse was common to both partners, but the remainder of the house was

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ing no necessary connexion with the parts which immediately precede or follow it. As to one of the cases mentioned in the plaintiffs' affidavit, viz., *In re Abin*, Mr. *Welsh* admits that he copied it *verbatim* from Messrs. *Crawford and Dix's Reports*, the copyright of which is in the plaintiffs; and the question of piracy does not depend upon the quantity

Crawford and Dix's Circuit Cases, p. 72.

The defendant's Book, p. 219.

ground that he was not the sole tenant or owner of the premises, in respect of which he claimed to register.

It appeared that the claimant and one Crosthwaite were partners in trade; that the former resided in a house which comprised a warehouse or shop, in which warehouse the partnership business was carried on; that the warehouse was common to both partners, but that the remainder of the house was used by claimant as a residence, Crosthwaite having a distinct and separate residence of his own; and that the portion of the house in the occupation of the claimant, being the premises in respect of which he sought to register, had a separate entrance, which was made use of by the claimant and his family only.

The claimant being examined, stated that the house had been originally taken by Crosthwaite as sole tenant thereof; that subsequently Crosthwaite put him (claimant) into possession of the part of the house which he then occupied, but for which he paid no rent to Crosthwaite; that the rent of the house was paid out of the proceeds of the partnership business, and that the greater part of the furniture in the apartments occupied by the claimant were his (claimant's) property.

TORRENS, J.—Might not Crosthwaite at any time enter upon the portion of the house now occupied by the claimant?

The claimant stated that the arrangement between him and Crosthwaite was, that the latter should not have the right of entry upon the part of the house inhabited by the claimant and his family.

J. Martley, Q. C., for the claimant, contended, that under the statute 2 & 3 W. 4, c. 88, s. 7, the claimant was entitled to register; that this was not a case of joint, but one of exclusive occupation, and came within the principle upon which *Kearney's case*, Alc. Reg. Ca. 22, was decided. Counsel also referred to Mol. Elec. 33, nn. 31, 32, 33, and the cases therein collected.

TORRENS, J.—Here there is a private and exclusive entrance; I think the circumstances of the case bring it within the principle which ruled *Kearney's case*, and that the claimant is entitled to register.

used exclusively by appellant as a residence, having a separate entrance, of which he had also the exclusive use. The house had been taken originally by Crosthwaite as sole tenant, who put appellant into possession of the part which he then occupied, but for which he paid no rent to Crosthwaite, the rent being paid out of the proceeds of the partnership business; but the greater part of the furniture of the apartments occupied by appellant was his own private property. The arrangement between appellant and Crosthwaite was, that the latter should not have the right of entry upon the part of the house inhabited by appellant and his family.

J. Martley, Q. C., for the appellant, contended that under the 7th section of the Reform Act he was entitled to register; that it was a case of exclusive and not of joint occupation, and came within the principle in *Kearney's case*, Alc. Reg. Ca. 22 (a). Counsel also cited Mol. Elec. a. 33, nn. 31, 32, 33, and cases there collected.

The Court decided that it was a case within the principle of *Kearney's case*, and overruled the rejection. *Craw. & Dix. Rep.* 72.

Order of rejection reversed.

(a) Post—title, *Shop*.

extracted. *Saunders v. Smith*; *Bramwell v. Halcomb* (a). But the defendant ought to have admitted that he copied the twenty-three cases—that is to say, every single case in *Crawford and Dix's* Reports relating to the registry of voters: he has expressly given every one of them upon the authority of Messrs. *Crawford's and Dix's* Reports; and it must be manifest to the Court that as they appear in the defendant's book, they are not fair abridgments, but substantially reprints of the original reports, some of which were published only a few months before. The alleged license from *Crawford and Dix* is distinctly negatived by them; but even if they had given it, it must have been *vox et præterea nihil*, for they had no authority to give it. We disclaim the idea of imputing to Mr. *Welsh* dishonorable intentions; but we submit that, in point of law, this is a clear case of piracy, and that the injunction ought to issue.

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Mr. *Monahan*, Q. C., and Mr. *David Lynch*, for the defendant.—

The statutes for the protection of copyright apply only to authors and their legal assignees; and a legal assignment can only be by an instrument in writing. Confessedly, there was none such in the present case until after the publication of the defendant's book; and the subsequent assignment cannot injuriously affect the defendant by an *ex post facto* operation. Therefore, even though it should be conceded that Messrs. *Crawford and Dix* (if the complainants) would, as authors, be entitled to the injunction now sought, the plaintiffs do not shew any legal right as assignees, and this Court exercises its jurisdiction only for the purpose of better enforcing the legal right. *Power v. Walker* (b); *Clementi v. Walker* (c); *Rundell v. Murray* (d); *Saunders v. Smith* (e). But the title of *Crawford and Dix* is by no means clear; at least as to four of the cases mentioned in the plaintiffs' affidavit, it is plain that *Crawford and Dix* had not any title to assign. Three of them are expressly given *ex relatione*. As to these, it could not be contended that *Crawford and Dix* had the copyright as the authors; and it is not pretended that they had it as the legal assignees by an instrument in writing. As to the fourth case adverted to, viz., *In re Aylward*, it now stands admitted that it is a mere reprint of a newspaper statement, and there could not be any pretext for saying that *Crawford and Dix* had any copyright in it. They admit that they occasionally gave cases *ex relatione*, and that they have copied into their Reports from *Hayes' Criminal Law* no less than sixty-three reports of cases of which they were not the authors; and from all that appears, there may not be a single one of the reported

(a) 3 My. & Cr. 737.

(b) 4 Campb. 9; 3 M. & Sel. 7.

(c) 2 B. & Cress. 861.

(d) Jacob, 311.

(e) 3 My. & Cr. 728, 735.

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cases mentioned in the plaintiffs' affidavit in which *Crawford and Dix* ever had any right.

But is this a case of piracy at all? That question resolves itself into—what were the defendant's intentions, and to what end did he make the extracts complained of? What was the subject of the extracts, and what proportion do they bear to the work from which they have been taken, and to the work in which they now appear? Has, or has not, the defendant used *Crawford's and Dix's* cases "in the fair exercise of a mental operation, deserving the character of an original work?" As to the intentions of Mr. *Welsh*, it is not suggested that they were different from what he has sworn them to have been. His object was not to deck himself in the plumes of *Crawford and Dix*, nor was he actuated by, or capable of the sordid desire of seizing the fruit of their labours. It was not with the hope or thought of pecuniary gain that he published his book, but with the intention and desire of doing a public good. Considering the present state of the Registry Law—the conflicting opinions respecting it—its vast importance—there can be no doubt that such a work as the defendant's was greatly needed, and would be of very great public utility. *Carey v. Kearsley* (a). Of what do the plaintiffs complain? The Reports of Messrs. *Crawford and Dix* contain 768 cases, only *twenty-three* of which have been used by Mr. *Welsh*; and for the reasons already stated, the question must be limited to *nineteen* of these. Mr. *Welsh's* book contains 120 cases; and for the purposes of this argument, we are entitled to assume that he had an unquestionable right to publish all of them, except the nineteen cases of *Crawford and Dix*. *Macklin v. Reddin* (b); *Baily v. Taylor* (c). It is idle to say that *Welsh's* book could be a substitute for the Reports of *Crawford and Dix*. Although they have a small portion of matter in common, they are in fact almost totally different in substance and effect. The plaintiffs' publications profess to be no more than historical accounts of proceedings in certain Courts of Justice—subjects which no man can monopolize. *Mathewson v. Stockdale* (d). The defendant's book is devoted exclusively to the investigation of a particular branch of the law, without regard to the history of Courts of Justice. He has collected from a great variety of works, which could not be obtained without much trouble and heavy cost, all the cases upon a particular subject, and has added to them a considerable number of cases never before published. All these are classified and arranged in his work under the several heads to which they properly belong; and critical notes (which, if collected together, would form a considerable portion of the volume) are appended to them, wherever it

(a) 4 Esp. N. P. C. 168.

(c) Tamlyn, 297.

(b) Ambler, 694.

(d) 12 Ves. 273.

appeared to the learned Editor that such assistance was at all necessary or desirable. *Whittingham v. Wooler* (a). His work is to all intents and purposes a treatise, and is as effectually the product of "a fair exercise of a mental operation, deserving the character of an original work," and incomparably more satisfactory and useful to the public, than it could have been, if the cases had been broken up and fused into the form of an essay. *Wilkins v. Aikins* (b). It is also to be observed that the cases have not been taken *verbatim*, and that the new versions of them are unquestionably great improvements upon the old.

But it has been hitherto the admitted custom of publishers of law books, both in England and in this country, to extract from the general Law Reports such cases as happen to relate to the particular subject of their works. In *Saunders v. Smith* (c), Lord Cottenham adverted to this custom in England, and mentioned several instances of it, amongst others, *Chitty on Bills*. In this country, also, similar instances may be found: for example, *Finlay's Landlord and Tenant*, in which many cases are taken at length from the Reports, and of these seven were taken from the Reports of Messrs. *Alcock and Napier*, the copyright of which was in the plaintiffs. The copyright in the statutes is fully as strong, if not stronger than in Law Reports; yet it is admitted that statutes may be copied in full in any treatise upon the particular subjects to which they relate (d). The difference between the copyright in a volume of Law Reports and the copyright of a poem is very obvious: the one work is a mere statement of public events—evidences of the law—which every man has a right to state, and comment on, and publish as he pleases; the other is the creation of an individual mind, in every part and parcel of which the author or his representative has a pervading copyright. It may be said that a reporter has a copyright in his compilation, but the authorities upon that subject cannot avail the plaintiffs in this case, and clearly shew, that even independently of the proportion of new matter in Mr. *Welsh's* book, it is by reason of its collection and classification of old matter "deserving the character of an original work." *Anonymous v. Leadbetter* (e); *Barfield v. Nicholson* (f); *Carnan v. Bowles* (g).

We beg the attention of the Court to the number of books which a person should have before him, in order to learn the same subject-matter as is contained in Mr. *Welsh's* book. He should have *Molynaux's Election Law*; *Hudson's Election Law*; *Batty's Reports*; *Alcock's Registry Cases* (2 sets); *Alcock's and Napier's Reports*; *Welsh's Registry Cases* (2 publications); *Gumley on Elections*; *Law Recorder*

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(a) 2 Swanst. 431.

(b) 17 Ves. 424.

(c) 3 My. & Cr. 728-9.

(d) 2 vol. Evan's Collection of the Statutes, 19.

(e) 4 Ves. 481.

(f) 2 Sim. & Stu. 1.

(g) 2 Bro. Ch. Ca. 84.

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(New Series, 6 volumes); *Irish Law Reports*; *Jebb's and Symes' Reports*; *Glascok's Reports*; *Crawford's and Dix's Abridged Notes of Cases*; and *Crawford's and Dix's Circuit Cases* (2 parts). The defendant's book may be had for £1, and the Reports of *Crawford and Dix* alone would cost £2. 10. Under the circumstances, this Court ought to withhold its hand, at least until the plaintiffs shall have established their title in a Court of Law. If they are not entitled to succeed at law, they cannot be entitled to have an injunction in this Court. If they are entitled, no possible injury will be done to them by obliging them in the first instance to establish their legal right; as the Court may put the defendant under terms of keeping an account of the sale in the mean time, &c. On the other hand, it would be a most severe proceeding against the defendant, if, before the plaintiffs establish their title at law, this Court would restrain the sale of so considerable a book as the defendant's, on account of the very small portion of it to which the plaintiffs object, and which, from the nature of the case, cannot now be separated from the rest. We submit that for the sake of the public good, the injunction ought to be refused.

Mr. Warren, Q. C., in reply.—Three grounds of objection are insisted upon:—First—that we have not shewn a legal title; second—that there is in fact no piracy; third—that the infringement of the legal copyright, if any, has been in a very small and harmless degree; that the portion abstracted forms but a small part of the defendant's book; and that upon considerations of public utility, such a work as the defendant's ought not to be restrained.

Perhaps as the pleadings are at present framed, I am precluded from insisting that it appears upon the admitted contract and dealings between Messrs. *Crawford and Dix* and the plaintiffs, that the former were employed by the latter to take notes of cases for them; and that the plaintiffs being the original proprietors of the copyright in the notes so taken, did not need any assignment to vest it in them. However, I think the pleader might have made that case. But suppose Messrs. *Crawford and Dix* to have been originally entitled to the copyright, there has been an assignment in writing from them to the plaintiffs. It is said that some of the reports in the volumes of *Crawford and Dix* were in fact not the works of these gentlemen, but given by them *ex relatione*; and as it does not appear that they had an assignment in writing from the authors, the Court is to conclude that they had no copyright in such cases to assign. This argument only applies to *three* of the *twenty-three* cases which we say have been pirated; but I may observe, that even if the *twenty three* cases were *ex relatione*, and if it appeared respecting them (as it appears respecting the *three* cases), that the several authors had made a gift of the manuscripts to *Crawford and*

Dix, I think they would have acquired a property in them which a Court of Equity would protect, and which would have passed by the assignment from them to the plaintiffs. In *Wyatt v. Barnard* (a), Sir Samuel Romilly said in argument—and Lord Eldon assented to it in his judgment—that a translation is as much the subject of copyright as original composition; and that the right, whether acquired by the personal exertion of the plaintiff, or by purchase, or *by gift*, cannot be invaded. In that case (as here) the custom of publishers was set up as a defence; but Lord Eldon said, the custom of booksellers cannot control the law; and as to the translation (which was there the subject in dispute), that it made no difference whether it was the work of the plaintiff himself or had been given to him: “The injunction, therefore, must go.” It is clear, that if a plaintiff seeking an injunction to restrain the sale of a piratical work, stands in the situation of assignee of an assignee, he need only shew that the assignment to himself was in writing, without tracing the title through the several *mesne* assignees from the author. *Morris v. Kelly* (b). The case of *Rundell v. Murray* (c), which was cited upon the other side, is really an authority for the position that the gift of a work in manuscript from the author to a person who revises and prepares it for publication, passes to the donee a title to the copyright, without an assignment in writing. But it is unnecessary to dwell longer upon the cases given *ex relatione*, as there are only three or four such, and I am entitled to assume, that to the copyright of at least nineteen of the cases mentioned in the plaintiffs’ affidavit, *Crawford and Dix*, who are distinctly stated to have been the authors of them, originally had the clear legal title, and that the plaintiffs had the clear equitable title as assignees. It is certainly a mistake to suppose, that although the Court possibly might enjoin the defendant at the suit of Messrs. *Crawford and Dix*, it could not do so at the suit of the plaintiffs. In the case of *The Universities of Oxford and Cambridge v. Richardson* (d), Lord Eldon said, “I am perfectly satisfied, that if the King’s Printer was a plaintiff, these defendants must be enjoined; that what they are doing is not according to law. The doubt I have is, whether these plaintiffs are the persons to enjoin: but, notwithstanding that, as there is no doubt as to the illegality of what the defendants are doing, I should not scruple to enjoin them until the hearing.” It is now clearly settled, that although in a Court of Law the plaintiff must shew a legal title, in this Court an equitable title is sufficient. In the case just mentioned, Lord Eldon, alluding to the case of *Boulton v. Watt* (e) said, “It is then said, in cases of this sort, the universal rule is, that if the title

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(a) 3 Ves. & B. 77.

(b) Eden, on Injunctions, 283—1 Jac. & W. 481.

(c) Jacob. 311.

(d) 6 Ves. 703.

(e) 6 Ves. 707.

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"is not clear at law, the Court will not grant or sustain an injunction, "until it is made clear at law. With all deference to Lord Mansfield, "I cannot accede to that proposition so unqualified," &c. The injunction was continued accordingly. So in *Mawman v. Tegg* (a), and the very late case of *Sweet v. Shaw* (b), which was nearly similar to the present. The observations of the Vice-Chancellor, distinguishing this latter case from *Saunders v. Smith*, would exactly apply to the case now before the Court. So in the case of *Lewis v. Fullerton* (c), which was before Lord Langdale so lately as Trinity Term, 1839. *Colburne v. Duncombe* (d) is also an authority to the same effect: for there, although the demurrer was allowed, as there was not any assignment in writing, and the author was not before the Court, yet, as it appeared that the author had delivered the manuscript to the plaintiff, who had duly paid for the copyright, the Vice-Chancellor, when allowing the demurrer, said, "But as the bill contains sufficient to shew that the plaintiff has a good "title in Equity, I shall give him leave to amend his bill without prejudice to the injunction." From these several decisions, it is plain that the objection to the plaintiffs' title in the present case cannot be sustained.—It is not necessary for me to argue the question whether or not the assignment in writing, subsequent to the publication of the defendant's book, would give to the plaintiffs a sufficient title to recover damages in a Court of Law; but in passing it, I may observe that the case of *Clementi v. Walker* (e), which has been cited to sustain the negative of that question, does not appear to me to be an authority for any such position. The work in that case was a musical composition by a foreigner, and had been originally published in France. The decision mainly turned upon that fact.

As to the objection, that from the nature of the subject-matter of Law Reports, there can be no copyright in them—or at least, no such copyright as could sustain an application like the present—it does not appear to me that there is any principle or authority to support it. Neither *Mathewson v. Stockdale* (f), nor *Wilkins v. Aikin* (g), gives any countenance to such a doctrine: they should rather be considered as decisions the other way. The leading decision upon the subject is that by Lord Hardwicke in *Gyles v. Wilcox* (h), which was followed in *Mathewson v. Stockdale*, and has ever since been fully recognised and acted upon. *Butterworth v. Robinson* (i); *Sweet v. Shaw* (k). The same general principle may be collected from *Trusler v. Murray* (l); *Longman v. Win-*

(a) 2 Russ. 401-2.

(c) Law Journ. vol. 17, p. 291.

(e) 2 Barn. & Cress. 861.

(g) 17 Ves. 422.

(i) 5 Ves. 709.

(b) Law Journ. vol. 17, p. 216.

(d) 9 Sim. 151.

(f) 12 Ves. 270.

(h) 2 Atk. 141.

(k) Law Journ. vol. 17, p. 216.

(l) 1 East, 363, n.

chester (a); *Mawman v. Tegg (b)*; and *Roworth v. Wilkes (c)*.—But the piracy is denied upon the assumption, that as the cases appear in the defendant's book they should be considered as abridgments. For that assumption there is no ground. There cannot be a doubt that, as the cases appear in the defendant's book, they are, with unimportant verbal alterations, substantially the same as the original Reports of *Crawford and Dix*—that they are merely colourable abridgments. In *Gyles v. Wilcox*, Lord Hardwicke said, "Where books are colourably shortened, "only, they are undoubtedly within the meaning of the statutes." It is said that the copyright of the statutes is as strong as the copyright of Law Reports. It may be so; but an abridgment of all the statutes on a particular subject has been restrained. *Baskett v. University of Cambridge (d)*. The consideration of the proportion which the pirated matter bears to the work from which it has been taken, and how far the piracy is likely to prejudice its sale, may be very important for a jury when ascertaining the amount of the damages to be given; but this Court cannot be governed by such considerations, although it should not perhaps entirely disregard them. The serious question here is, whether or not has a piracy been committed? The admitted fact, that the defendant has extracted from the Reports of *Crawford and Dix* every thing relating to the law of Registry, and the sworn statement of the plaintiffs, and of Messrs. *Crawford and Dix*, as to the injurious tendency and effect of the piratical use of their works in the defendant's book, must be conclusive upon that subject so far as it is at present material. The case of *White v. Geroch (e)* clearly shows that each case in a volume of Law Reports should be considered as a separate work. In *Sweet v. Shaw* (already cited), the matter pirated was not one-hundredth part of the works from which it was taken. On the other hand, the proportion which the matter pirated bears to the whole work in which the piracy occurs, in this case (if it be considered at all) scarcely furnishes an argument for the defendant. His book consists almost entirely of matter copied from others: the parts of which we complain form about one-fifth of the whole. The counsel on the other side think that proportion very small: we think it very great. But in several of the cases already mentioned, the publications enjoined were Cyclopædias and other very voluminous works, in which the parts complained of bore scarcely any proportion in amount or value to the whole work. In *Mawman v. Tegg (f)*, Lord Eldon has very fully stated the law in reply to the argument of "the hard consequences which would follow from "granting an injunction, when a very large proportion of the work is " unquestionably original.

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(a) 16 Ves. 269.

(c) 1 Campb. 98.

(c) 2 B. & Al. 298.

(b) 2 Russ. 285.

(d) 2 Burr. 661.

(f) 2 Russ. 390-1.

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I am not here called upon to dispute—and I would not dispute willingly—the right which, in *Whittingham v. Wooler* (a), a critic is said to have to make extracts from other literary productions in the course of his criticism; or the right of the author of a treatise upon any branch of law to a free and liberal use of the statutes, or the Law Reports, or other publications, so far as they are necessary or desirable for the purpose of this work. The objection to the work of the learned and ingenious author of *Smith's Leading Cases*, was, perhaps, a hard one, though it has not been by any means decided that it was an objection which could not have been sustained, if the special dealings of the parties had not avoided it; but no case of that kind is now before the Court. I am quite willing that the question of piracy in this case should be tried by the test proposed by Lord Eldon in *Wilkins v. Aikin* (b)—“Whether this is a legitimate use of the plaintiffs' publication in the fair exercise of a mental operation deserving the character of an original work?” I have no doubt that if Mr. Welsh had sufficient leisure for the work, he could have given to the public a learned and valuable treatise upon the Law of Registry in Ireland, but his present book is no more, and professes to be no more than its title-page announces of it; it is not a treatise; it is not a selection of certain cases for the purposes of criticism; it is merely a collection of all the published Registry Cases with a very few—and these by no means the most important—previously unpublished. The notes form a very small portion of the volume, and even these are not all original. It is not necessary for me to argue the question whether or not Mr. Finlay, or Mr. Hudson, or Mr. Lyne, have all or either of them exceeded their privileges in the extracts made from the statutes or the Law Reports in their respective treatises. In the case of useful treatises, I should hope that the law would look with a liberal and indulgent eye. But I must say, that the defendant's present book appears to be a species of publication altogether inadmissible. *Clementi v. Goulding* (c); *Tonson v. Walker* (d); *Bramwell v. Halcomb* (e). It has been already said that there is in this case no imputation upon the defendant's motives for publishing his book; but, as was said by Lord Ellenborough in *Roworth v. Wilkes* (f), “The intention to pirate is not necessary in an action of this sort. It is enough that the publication complained of is in substance a copy whereby a work vested in another is prejudiced.”

The argument which was much pressed by the counsel upon the other side, resting upon the supposed public utility of such a book as the defendant's, seems to me to be totally inconsistent with the principles of

(a) 2 Swanst. 431.

(b) 17 Ves. 422.

(c) 11 East, 244.

(d) 3 Swanst. 672.

(e) 3 My. & Cr. 737.

(f) 1 Campb. 94.

a Court of Justice. As to the supposed public utility of the work in question, I might be permitted (if it was necessary) to express a different opinion; but I need only refer to your Honor's decision in *Croly v. Mathew* (a), in which an injunction was sought to restrain the defendant from converting leasehold premises into a cemetery, to the prejudice of the landlord. In that case it appeared that the defendant, under the influence of very benevolent motives, attempted to establish this cemetery for the interment of the poor at a small expense; and that from the arrangements made, it would have been of great public utility, and an ornament to the neighbourhood; but your Honor held that the injunction should go, as the defendant had no right to do a public good at the expense of another. It is for the legislature to say what the public good requires, and how far in particular cases the rights of individuals must give way to it. But nothing less than an act of parliament can abridge private rights, even for the service of the public. What is the public good, and what it requires, neither the Court nor the suitor can say, except in so far as the law has ascertained them. If each man's notion of public utility should avail as a defence for his invasion of the rights of others, justice would be extinct.

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[The conflicting statements as to the alleged license were commented upon by the counsel on both sides.]

The case stood for judgment.

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MASTER OF THE ROLLS.

This case has been so recently before the Court, and so ably and fully argued,* that it will not be necessary for me in giving my judgment to state the facts at length. It is an application on the part of the

(a) 1 Cawf. & Dix. Abr. N. C. 86.

* Several of the discourses delivered by the Counsel in this case—especially that of Mr. David Lynch for the defendant, and Mr. Warren's masterly reply—were much admired; but a detailed report of them would have been too long for admission into a work of this kind. However, the Reporter has endeavoured to give the substance of the discussion, and the authorities referred to in the course of it.—After all, it must be evident upon a very little consideration, that in a great majority of cases, and in nearly all of the most important ones, a law report (with the exception of the judgment, which, of course, must be given as nearly as possible in the words in which it was delivered), ought to be—and to be useful, must be—strictly the Reporter's statement. It ought to state only so much of the case and of the arguments of Counsel as is necessary fully to develop the question, and the force and effect of the judgment. Although in the present case, little more than condensation was required, it generally happens that a law Reporter must select as well as condense; and that care, and discretion and legal knowledge are required in the very nice and troublesome operation of reducing a case to its essentials, and divesting it of irrelevant matter, can scarcely be doubted by any person who is familiar with the nature of legal inquiry;—or who has observed the ludicrous misrepres-

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'plaintiffs, before answer, to restrain the defendant, by the injunction of this Court, from selling or otherwise disposing of a certain work entitled "*Registry Cases*," &c., published by him as the author, and containing Reports of Cases alleged to have been copied from the Reports of Messrs. *Crawford and Dix*, with which we are all familiar. The bill states that Messrs. *Crawford and Dix* were the authors of these Reports; and that the plaintiffs had contracted with them for the purchase of their copyright therein, for a certain sum of money; part of which to a considerable amount had been paid to Messrs. *Crawford and Dix* long previous to the publication of the defendant's book; and that on the 22d April 1840, subsequent to the publication complained of, the previously existing contract was carried into effect by a legal assignment from Messrs. *Crawford and Dix* to the plaintiffs; that the plaintiffs thus acquired a legal title in what they before had an equitable interest; and that the book in question is an invasion of their copyright in the said Reports.

In the argument of this case four questions, to which I think it necessary to advert, have been raised:—First, it is argued that the works of Messrs. *Crawford and Dix*,—or to make use of a more general expression, the works published under their names,—are not such literary works as give to the authors, or to any persons deriving under them, the protection which is afforded to literary productions.—Second, that as the plaintiffs had not, when the defendant published his work, procured an assignment in writing of such title as Messrs. *Crawford and Dix* had, they cannot maintain a bill for an injunction.—Third, that even if Messrs. *Crawford and Dix* had any property in the works as authors or compilers which the Court would protect, and even if the plaintiffs had a perfect title by assignment from them, the act done by the defendant is not one for which the plaintiffs can have any redress; and to sustain this position what is said to have been the usage in similar cases is relied on; and it is also said that the defendant's work is not a mere copy of the reported cases, but a treatise on the general law of registration as collected from them.—Fourth, that the defendant, by reason of what occurred between him and Messrs. *Crawford and Dix*, was induced to believe that he

sentations of legal cases which frequently appear in the newspapers;—or who has ever himself tried to prepare a report. It is, therefore, scarcely fair to treat law reports as mere narratives of public events; but even if no other merit should be allowed to them, it is to be remembered that the same chain of events or facts may be narrated with very different degrees of skill and clearness; and all who have much acquaintance with the Reports must know, that as mere narratives they present as great (perhaps much greater) differences in style and method of narration, and as great disparity of merit, as any set of histories that could be selected. The present Reporter may, perhaps, take this opportunity of saying that although he believes his reports may be relied upon as faithful and substantially accurate statements of the several cases and decisions to which they relate, he is conscious there may be found in them very many defects of composition and numerous errors of the press. Some of these are no doubt to be accounted for by his want of more experience, or better skill; but most of them, and perhaps the most objectionable, would have been avoided, if the rapidity of the publication could have admitted of more elaborate correction.

might make use of these Reports, and having done so with their permission, and having included a few cases reported by them in his work, ought not now be enjoined from selling this work merely because it contains those cases.

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As to the first objection, I cannot see any valid distinction between the work of a Reporter of the decisions of a Court of Justice, and that of any other author. It is true, that he merely states matters which have occurred in public, and which any other person in the community may in like manner publish, though it would appear that formerly the permission of the Judges to publish their cases was sometimes given. But the Reporter bestows his time and labour on the production of the report in a proper form: he has in many instances to refer to the original documents in order to learn the facts accurately, and is, in my opinion, as much to be considered the author of the work published as the *Reports of legal decisions* as the historian who records facts passing from day to day, taking many of the materials for his work, perhaps, from public documents accessible to all. In *Butterworth v. Robinson* (a), the proprietor of the copyright in the Term Reports obtained an injunction against the sale of a work which purported to be an Abridgment of Cases at Law and in Equity, but which copied, or nearly copied, cases contained in the Term Reports. Indeed, in many cases it seems to be conceded, and in my opinion it must be conceded, that there is a copyright in the author of such Reports, or his assignee, which the law will recognise, and if necessary protect. I do not think that the defendant can successfully contend that Messrs. *Crawford and Dix* had not originally such copyright, merely because some of the cases published by them are given *ex relatione*. Whether they had a copyright in such cases it is not necessary to determine in this case: it is sufficient to see that as to some of the cases they unquestionably had the copyright, and to repeat the observation of Lord Kenyon in *Carey v. Longman* (b), that "Courts of Justice have been long labouring under an error, if an author have no copyright in any part of a work, unless he have an exclusive right to the whole book." I am clearly of opinion that the first objection made to the plaintiffs' right to the injunction cannot be sustained, and I now come to consider the second.

The case of *Powell v. Walker* (c), decided in 1814, and, perhaps, that of *Clementi v. Walker* (d), decided in 1824, may be considered as deciding that at law, in order to give an assignee a legal title to a copyright, the assignment must be in writing; but I think that before and since these decisions, Courts of Equity have been in the habit of inter-

(a) 5 Ves. 706.

(b) 1 East, 359.

(c) 3 M. & S. 7.

(d) 2 B. & C. 861.

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fering when a perfect equitable title is shewn. In the case of the *Universities of Oxford and Cambridge v. Richardson* (a), Lord Eldon distinctly lays down this doctrine: he says—"It is then said in cases of this sort "the universal rule is, that if the title is not clear at law, the Court "will not grant or sustain an injunction, until it is made clear at law. "With all deference to Lord Mansfield, I cannot accede to that proposition so unqualified. There are many instances in my own memory "in which this Court has granted or continued an injunction to the "hearing under such circumstances. In the case of patent rights, if "the party gets his patent, and puts his invention in execution, and has "proceeded to a sale, that may be called possession under it, however "doubtful it may be whether the patent can be sustained. This Court has "lately said, possession under a colour of title is ground enough to "enjoin and to continue the injunction until it shall be proved at law that "it is only colour, and not real title;"—and in *Mawman v. Tegg* (b), decided in 1826, after the decisions in *Powell v. Walker* and *Clementi v. Walker*, with which he was well acquainted, he says "Whether the "title in the plaintiffs be a good legal title is one question, but it appears "to me that by having a complete equitable title," &c., and he put the defendants under terms to admit the title of the plaintiff in case the action mentioned in his order proceeded to trial. In *Colburn v. Duncombe* (c), the Vice-Chancellor granted and continued an injunction against an infringement of a copyright, though the title of the plaintiff was merely an equitable one. On the authority of this last and other cases, and considering the principle upon which this Court acts, of treating all things as done which parties have agreed to do, and seeing that the plaintiffs have published the Reports of Messrs. *Crawford and Dix*, and paid to them considerable sums of money for the copyright, I am of opinion that the objection grounded on the want of an assignment in writing previous to the 22d of April last, is not sufficient to induce the Court to refuse an injunction to the plaintiffs, if they are otherwise entitled to it.

With respect to the third objection: the question whether any particular work is or is not an infringement of the copyright of another work, must in a great measure depend upon the facts of each particular case, and cannot, I think, be decided upon any general principle, though there are some principles which should be attended to, and will always aid a Court in coming to its decision. I do not think it at all necessary to decide in the present case, whether any person writing a treatise upon any part or branch of the law may, as has been very frequently done, copy from reports, and insert in his work reports of cases bearing on the subject of his treatise. It might, perhaps, be difficult to maintain that he could.

(a) 6 Ves. 707.

(b) 2 Russ. 401-2.

(c) 9 Simons, 162.

But in the present case no such question arises, the defendant's work is not a treatise on the law of the registration of voters; it is, what in its title-page it professes to be, a book "comprising all the published "and many of the recent unpublished decisions in Ireland respecting "the registration of voters;" it includes all relating to that subject in Messrs. *Crawford and Dix's Reports*, and gives many of them without any comment, merely inserting them under some particular head to which he thinks they can be referred. I am of opinion that the defendant had no right to make such a use of the Reports of Messrs. *Crawford and Dix*. The intention is avowed in the title-page of the defendant's book, to take not merely a few cases for the purpose of illustrating a position in his work, or for comment, but to take *all* that refer to the subject, no matter how numerous they may be. As well might it be contended that a person publishing a collection of songs or poems has a right to resort to the publication of another consisting of poetry, and prose, and take from it all the poetry for his collection.

I come now to the only remaining objection, namely, that the plaintiffs cannot, after what passed between the defendant and Messrs. *Crawford and Dix* in February last, maintain the present application. It is to be regretted that there should be any difference between Messrs. *Crawford and Dix* and the defendant in their recollection of what passed between them at the interview in question. I am certain that these gentlemen have each of them represented the conversation precisely as they now recollect it. It is, I think, to be regretted that the defendant did not, in a case of this nature make a more formal communication, or state in writing what he intended to do, rather than trust to a casual conversation in the street; I would in passing merely observe, that if I were called on to decide this case on the effect of this conversation, I would, recollecting what is admitted to have passed between the defendant and Mr. *Dix* after the conversation in Grafton-street, be disposed to say that the defendant's recollection of the conversation was more accurate than that of Messrs. *Crawford and Dix*; the admitted observation of Mr. *Dix* seems to imply that at the previous conversation something had been conceded. But I think even if Messrs. *Crawford and Dix* had given to the defendant the permission which he says they gave, such permission would not, under the circumstances of this case, justify the defendant's publication. Messrs. *Crawford and Dix* had at the time no authority to give such permission; the plaintiffs who had published the Reports and to whom defendant ought to have applied, were the equitable owners of the copyright, and, therefore, the consent of Messrs. *Crawford and Dix*, even if it was clearly made out that such consent was given, ought not to affect the rights of the plaintiffs.

It is said that the defendant's publication will be useful to the profession, to the public, and to members of parliament; perhaps it

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would be so, but in cases of this kind the Court has not, in my opinion, a right to entertain any such question. If such a principle is established, each case will depend on the taste or caprice of the Judge, or his, perhaps, erroneous opinion of the utility of the work. The Court has, I think, merely to consider whether private rights have been invaded, and if so, to prevent the continuation of the injury, without inquiring whether the defendant's publication is useful or not. I hope sincerely that the parties may be able to effect some amicable arrangement of the matter in dispute between them; but for the reasons already stated, I feel bound to grant the injunction.

Injunction granted.

Wednesday, May 13th.

SOLICITOR AND CLIENT—LIEN—TITLE DEEDS.

**In the Cause of RUTLEDGE v. RUTLEDGE; and
In the Matter of GEORGE RUTLEDGE, Petitioner; and THOMAS JONES
and SIDNEY VAUGHAN JACKSON, Solicitors, Respondents.**

A solicitor who withdraws from the conduct of a suit, because the client will not furnish him with the funds necessary for carrying it on, has not such a lien, for the costs already incurred, as will entitle him to withhold from his client and his new solicitor such of the client's papers as are necessary for the effectual prosecution of the cause.

The case of Heslop v. Metcalfe, 3 My. & Cr. 183, considered.—A similar order in this case.

THE petition and affidavit of George Rutledge stated, that the deponent being seized in possession of certain estates in the counties of Mayo and Galway, his title thereto was impeached by one Robert Rutledge, since deceased, who brought two ejectments on the title for the said estates, and filed a bill for a receiver in the meantime, and to remove temporary bars.—That upon the trial for the Mayo estate, the Jury could not agree; and upon the trial for the Galway estate, the plaintiff Robert Rutledge was nonsuited; in consequence of which the suit so instituted in this Court was abandoned, and deponent left in the enjoyment of his said estates.—That Thomas Jones, one of the respondents, was retained by deponent, as his attorney and solicitor, to defend the said ejectments and the said equity cause; and that shortly after the determination of the said suits, the said Thomas Jones furnished to deponent his costs, which had never been taxed; and that deponent had since paid to the said Jones about £1200 on account.—That the plaintiff in the present cause, David Watson Rutledge, claiming under the late Robert Rutledge, had lately brought two ejectments on the title for the said Mayo and Galway estates, and had also filed the bill in this cause against deponent, for the removal of temporary bars.—That some short time before the institution of the several last-mentioned suits, the respondents Jones and Jackson entered into partnership; and that deponent having retained them as his attorneys and solicitors in said several suits, they took defence for him to the said ejectments, and entered his

appearance, and prepared and filed his answer in this cause; and that issue having been joined in this cause, the plaintiff was now proceeding with the examination of his witnesses.—That since the respondent Jones became the solicitor of this deponent, and before and since the establishment of the partnership between Jones and Jackson, various title-deeds, &c., relating to the said estates and the title of this deponent, had come into the possession of the said respondents, who had, as deponent was informed and believed, procured attested copies of the said several proceedings in the causes, both at law and in equity, so instituted by the said Robert Rutledge, deceased, and the present plaintiff, David Watson Rutledge, respectively.

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That since the institution of the said several suits now depending, the said respondents had received from deponent considerable sums of money for the defence of this deponent against the said suits.—That frequent applications had been made by the respondents, and especially by the respondent Jackson, to the deponent, for farther sums of money, which, as they alleged, were necessary for the conduct of this deponent's defence; and that they had informed this deponent upon several occasions, that he should make the advances of money which they required for conducting the defence, as they could not continue any longer to make advances for him.—That deponent now had in his possession a letter lately received by him from the respondent Jackson, in the words and figures following:—"2d of April, 1840.—My dear Sir—I applied "to Oliver Jackson for cash to enable me to carry on the several suits "now pending in our office, in which you are a party, and he informed "me that he has no funds of yours in his hands. I therefore think it "right to inform you of the circumstance, in order that you may not "impute to us neglect or want of due diligence as your solicitors; for I "told you before, and now tell you candidly, that you cannot expect "that we will send out briefs, and pay counsel's fees, and other necessary "disbursements, out of our own pockets. We are already considerably "in advance.—Your's very truly, Sidney Vaughan Jackson.—To George "Rutledge, Esq."

That the said Oliver Jackson, in the said letter mentioned, being the land agent of this deponent, and also being the uncle of the said respondent, S. V. Jackson, had advanced to this deponent the sum of £6000 on mortgage of the said estates; and that since the institution of the said suits now depending, the said Oliver Jackson, in order, as deponent believed, to secure to himself the money so advanced by him, had refused to pay to this deponent more of the rents of the said estates than was requisite for his maintenance.—That deponent was consequently unable to comply with the demands of the respondents; and that as they appeared to have declined to be any longer professionally concerned for him, he had been under the necessity of changing from them as his attorneys and solicitors,

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and appointing his present attorney and solicitor, Joseph Kelly, in their stead.—That although issue had been joined in the said cause depending in this Court, and the plaintiff had been examining his witnesses, the respondents had not laid the pleadings before counsel for advice as to the course to be pursued by deponent; and that, as deponent was informed and believed, it was absolutely necessary that the said deeds, documents, and papers which had so come into the possession of the respondents, as deponent's attorneys and solicitors, should be delivered by them to the said Joseph Kelly, to enable him to defend the said several suits on behalf of this deponent.—That several applications had been made, by and on behalf of this deponent, to the said respondents, calling on them to hand over to the said Joseph Kelly the said deeds, documents, and papers, and all other deeds, documents, and papers belonging to this deponent; and that they had refused so to do, alleging that there were costs due to them by this deponent, for the proceedings taken by them on his behalf, in the said several suits now depending, and that they were entitled to retain, and would not give up the said deeds and papers, until the said costs so alleged to be due by them should have been paid.

That the costs incurred on behalf of deponent in the several suits so instituted by Robert Rutledge, deceased, were never taxed; and, as deponent believed, if they should be taxed, it would appear that they had been greatly overpaid by this deponent. That deponent wished the said respondents would furnish the costs so claimed by them, that the same might be taxed.—That in case it should appear, upon the taxation of the costs incurred in Robert Rutledge's suits, that a balance was due to this deponent, he should be allowed to set off such balance against whatever sum should be found due to the respondents on account of the costs incurred on behalf of this deponent in the suits now depending.—That whatever balance should be found to be due to the respondents from deponent, he was willing and hereby offered to pay; and deponent submitted, that the said deeds, documents, and writings should be delivered up to the said Joseph Kelly, as deponent's attorney and solicitor, to remain in his possession subject to the lien of said respondents for such balance, if any, as might appear to be due and owing to them upon such taxation.

The petition prayed that the said respondents should hand over upon oath, to the said Joseph Kelly, as petitioner's attorney and solicitor, all deeds, documents, and writings of every kind and description which they or either of them had in their possession, custody, power, or procurement, as the former attorneys and solicitors of petitioner; and that the costs incurred on behalf of petitioner in the said causes instituted by the said Robert Rutledge, deceased, might be taxed and ascertained; and that the respondents should furnish to petitioner's present solicitor

their costs in the said several suits now depending, that the same might be likewise taxed and ascertained; and for that purpose, that the said several bills of costs might be referred to one of the Masters, and that petitioner should have all fair credits and allowances, and be declared entitled to set off any balance which should appear to be due to him on the taxation of the costs incurred in the said suits instituted by the said Robert Rutledge, against the balance, if any, which should appear to be due from him on the taxation of the said costs incurred in the said suits now depending.

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The respondents made an affidavit in reply, stating that the £1200 mentioned in the petitioner's affidavit had been paid by the petitioner to the respondent Jones in the year 1833, in settlement of the bill of costs previously incurred in the suits instituted by Robert Rutledge.—That they had not refused to conduct the petitioner's defence in the suits now pending, although they were unwilling to advance their own money for the purpose.—That since the writing of the letter of the 2d of April 1840, the petitioner had made for the purpose of his defence some small and totally inadequate advances of money to the respondents, which they had disbursed; and that they had been employed by him as his attorneys and solicitors in several matters, and had been changed without any previous notice. They submitted that they could not be required to part with the documents on which they had an unquestionable lien for costs, until the lien should have been discharged by payment of the costs.

Mr. Smith, Q. C., with whom was Mr. Walter Bourke, for George Rutledge, now moved the prayer of the petition.

Mr. Warren, Q. C., and Mr. Whiteside for the respondents.

[The following cases were referred to by the counsel on either side: *Colegrave v. Manley* (a); *Heslop v. Metcalfe* (b); *Strangways v. Harman* (c); *Horlock v. Smith* (d); *Commerell v. Poynton* (e); *Mayne v. Watts* (f).]

The case stood for consideration.

Monday, May 18th.

The MASTER OF THE ROLLS, after stating the contents of the affidavits on both sides, now delivered his judgment as follows:—

I think it appears from the admitted statements of the petition, and especially from Mr. Jackson's letter of the 2d of April last, that Messrs. Jones and Jackson have declined to be further concerned for the petitioner, except upon terms with which he is unable to comply. The

(a) 1 Turn. & Russ. 400.

(c) 1 Ir. Eq. Rep. 467.

(e) 1 Swanst. 1.

(b) 3 My. & Cr. 183.

(d) 2 My. & Cr.

(f) 3 Swanst. 95.

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letter of the 2d of April amounts to that. It is a notice from Mr. Jackson on the part of himself and his partner, referring to several previous communications to the same effect, the plain meaning of which is, that they will not go on with the defence of the several suits now pending against the petitioner, unless he will advance the money required for counsel's fees, and the other necessary outlay in the progress of the defence.) The petitioner states, that he is at present unable to make the advances required by the respondent, and his inability in this respect is not denied. There has been some hesitation on the part of the respondents and of their counsel to admit the absolute refusal to proceed further for the petitioner; but the main facts on which the petition rests are uncontradicted; the letter of the 2d of April still remains; and I do not find that even since this petition has been presented, and the respondents have had notice of it, there has been any offer on their part to proceed. I do not say that such an offer, if made, could affect my order upon this motion, but I notice the omission of it as shewing that there can be no mistake as to the intention of Mr. Jackson's letter, and the several previous intimations of the like kind to which it refers.

Upon the question, whether it is allowable for a solicitor under any and what circumstances to desert the defence for which he has been retained and in which he has acted, I am not at present called on to give any opinion. The respondents assuming their right to discontinue their professional services would go a step further, and insist that the several documents and papers of the petitioner, which have come into their possession in the course of their employment as his solicitors—and without which it seems his defence cannot be made—they are entitled to withhold from him until the amount of the costs incurred by them in the suits now pending, and for which they claim to have a lien, shall have been paid. The petitioner only asks, that, as the respondents will not defend him, his papers in their hands, material for his defence, may be handed over by them to his present solicitor, subject to such lien as they may have for the costs already incurred. Under the circumstances, I cannot perceive any advantage which the respondents could reasonably hope to gain by refusing this equitable request, and I am clearly of opinion that whether it would be for their advantage or not, they have no right to do so. I do not stop to observe upon the magnitude of the interests at stake in the petitioner's defence, though in this case worthy of remark; for whether great or small, injustice should not be done to them; and this Court ever has exercised, and I trust ever will exercise its jurisdiction to prevent the delays, and remove, as far as possible, the hindrances of justice.

In the case of *Colgrave v. Manley (a)*, Lord Eldon decided that where a solicitor discharges himself, he cannot afterwards retain the papers of his client, so as to impose any difficulty in the way of his carrying on his

(a) 1 Turn. & Russ. 400.

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business; and in *Heslop v. Metcalfe* (a), the present Lord Chancellor adopted, and applied in a more useful form, the principles of Lord Eldon's decision, and confirmed an order, made by the Vice-Chancellor, that a solicitor who withdrew from the conduct of a suit, because the costs were not advanced to him, should deliver up to the plaintiff's new solicitor, the briefs, &c., without prejudice to any right of lien he might have for his costs. In *Strangways v. Harman* (b), there was a similar decision. I cannot see any valid distinction between those cases and the present. In *Tidd's Practice* (c), where all the cases at law upon the subject are collected, it is laid down, that "When an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself; and it is said to be his duty to proceed in the suit, although his client neglects to bring him money." If this be so at law, with equal reason, if not with much more reason, it should be so in equity; and accordingly in *Cresswell v. Byron* (d), Lord Eldon expressed a doubt that a solicitor thus discharging himself could claim a lien or maintain an action for his costs. However, some of the Courts have since inclined the other way, and in *Vansandau v. Browne* (e), and *Harris v. Osbourne* (f), it was held that a solicitor after giving a reasonable notice may withdraw from the management of a cause before its termination, and maintain an action against his former client for the costs incurred. What is reasonable notice, must always be a question of much difficulty. In *Hoby v. Buitt* (g), it was decided that notice on the Saturday before the Commission day (Thursday) was not sufficient; and in *Cresswell v. Byron*, Lord Eldon says that the Court of Common Pleas held that an attorney who quitted his client before trial, could not maintain an action for his bill.

Whether the cases of *Vansandau v. Browne* and *Harris v. Osbourne* have been well or ill decided I need not now inquire; for although an attorney may have a right to withdraw, and maintain an action for costs before the termination of the suit in which they were incurred, I have no doubt that he cannot, under a claim of lien, retain the papers necessary for the effectual prosecution of the suit which he has declined to prosecute himself. If he will not go on, it is well; but let him not stop other people: as he chooses to withdraw his services, let him not seek to make the loss of them irreparable and ruinous, by tenaciously holding the papers, without which no other solicitor can proceed in his stead. Agreeing entirely as I do, in the principle stated by Lord Eldon in *Commerell v. Poynton* (h), that a solicitor withdrawing from the management of a cause has not such a lien for the costs incurred in it as will entitle him to withhold from the new solicitor such of the papers

(a) 3 My. & Cr. 163.

(c) 9th Ed. p. 86.

(e) 2 Moo. & Scott, 560.

(g) 3 B. & Ad. 350.

(b) 1 Ir. Eq. Rep. 467.

(d) 14 Ves. 272.

(f) 2 Crompt. & Mee. 630.

(h) 1 Swanst. 1.

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in his hands as are necessary for proceeding effectually in the cause—
 “That a solicitor cannot by virtue of his lien prevent the King’s subject
 “from obtaining justice”—I feel bound in this case to follow the decisions
 in *Heslop v. Metcalfe*, and *Strangways v. Harman*, and to order that
 the respondents do hand over the petitioner’s papers to his present
 solicitor, Mr. Kelly, for the purpose of his defence in the suits now
 pending against him, subject to such lien as they may have for costs;
 and upon Mr. Kelly’s undertaking to return all such papers to the res-
 pondents within ten days after the termination of the suits now pending,
 and also to permit the respondents in the meantime to have access to
 them at all reasonable times for the purpose of making extracts, &c.,
 with a view to the making out of their bill of costs, and the taxation
 of it. But as no objectionable items have been shewn in the bill which
 was furnished and paid in 1833, I dismiss the petition in so far as it seeks
 a taxation of that bill, and a set off of payments made on foot of it, against
 the costs now due.

—◆—
Tuesday, May 5th.

COSTS—SEVERAL ANSWERS OF FORMAL DEFENDANTS.

BATEMAN and HIGGINS *v.* EDWARD BATEMAN and others.
 NAGLE and others *v.* BATEMAN and others.
 HENRY *v.* BATEMAN and others.

Where, appar-
 ently for
 the purpose of
 accumulating
 costs, several
 similar an-
 swers of vex-
 atious length
 were put in on
 behalf of a
 number of for-
 mal defend-
 ants who ap-
 peared to have
 acted upon an
 understanding
 with the plain-
 tiffs, and under
 the directions
 of the same
 solicitor,—on
 motion of the
 principal de-
 fendant that
 further pro-

THE three causes above named were instituted for the due execution of
 the will of John Bateman, deceased. In all of them, Edward Bateman,
 on whose behalf the following application was now made, was the prin-
 cipal defendant, being (as the Reporter collected) the executor and
 trustee of the will, and entitled, as residuary legatee, to the principal
 part of the property thereby disposed of. The cause of *Henry v. Bate-*
man had been instituted long before either of the others, and in it a
 large fund was brought into Court, which was afterwards transferred to
 the credit of the three causes. It appeared that the defendant Edward
 Bateman was entitled to this fund, subject to the rights of the plaintiffs
 in the causes firstly and secondly above named, the several parties in
 which were nearly related to the testator; and it was stated that there
 was some enmity or very angry feeling existing towards the defendant
 Edward Bateman from the other parties. The complainants Bateman
 and Higgins were entitled, under the will of John Bateman, to compa-

ceeding should be stayed, &c.—it was referred to the Master to ascertain the amount
 due to the plaintiffs, and to tax their costs of proceeding against the principal defendant
 only, but not the costs of proceeding against the other defendants, the Court being of
 opinion that they were not properly and necessarily incurred; and it was further ordered,
 that the principal defendant should pay, &c., he so undertaking, within ten days after the
 report; that the cause should be stayed in the meantime; and that the plaintiffs should
 not be allowed their costs of appearing on this motion.

ratively small legacies, and, as the defendant Edward Bateman alleged, he had from time to time made payments to them on account, so that after all just credits, it would appear that little, if any thing, of the legacies was due to them at the time of the institution of their suit. However, they lately filed their bill for the legacies, stating that they were still due, and making all the parties in *Nagle v. Bateman* co-defendants with Edward Bateman. It appeared that under the existing circumstances, all the persons so made defendants (excepting Edward Bateman) were merely formal parties, who had not any interest requiring to be protected in that cause, and that although their answers were not material for the plaintiffs' case, they had severally put in answers of six skins each. It was positively sworn on the part of Edward Bateman, that although the several complainants and defendants in the first and second causes appeared to have several solicitors on record, the said several solicitors were not really concerned, but their names were merely made use of by one solicitor, who appeared on record to be concerned for one of the parties only, but who was in fact concerned for all the parties, both complainants and defendants (excepting Edward Bateman himself) in both causes. This was denied on oath by the solicitor in question, and affidavits were produced from or on behalf of the several other solicitors whose names were mentioned, stating that they had been respectively retained by the parties for whom they appeared. However, it was admitted that all the parties in both causes (excepting Edward Bateman) had originally applied to the one solicitor to be concerned for them respectively;—that they did not retain any other solicitor until they had been informed by the gentleman in question that he could not be concerned on both sides in the same cause; but that although he could not be concerned for them all, he would (as they were, in fact, all in the same interest) be happy to give any advice or assistance that might be required to whatever solicitors they should select; that the several solicitors afterwards retained were directed by their several clients to apply for information to, and be directed by the one solicitor, and that they had accordingly done so. It was also stated, that several of the defendants had been informed, that as they were in fact only formal parties, and as the substance of all their answers must be the same, they ought to put in a joint answer; but that they positively refused to do so. On the other side, several facts were adduced, strongly tending to shew that the solicitor for some of the defendants must in fact have been the solicitor by whom the plaintiffs' bill was prepared, and afterwards amended; and that although the several answers were filed in the names of different solicitors, they must have been, in fact, prepared and put in by the same hand.

Mr. *Brewster*, Q. C., with whom was Mr. *Monahan*, Q. C., for Edward Bateman, now moved that all the proceedings in the first cause might

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be stayed, and that it might be referred to one of the Masters to take an account of the sums due to the plaintiffs, or either of them, on foot of their respective legacies, after all just credits, &c.; and that it might be referred to the said Master to tax and ascertain the costs of the said plaintiffs in the said cause; and also the costs of the defendants properly incurred by them; and that the said Master might be directed, when taxing the said defendants' costs, either to disallow all the costs of the defendants (particularly named), subsequent to the appearances entered by them; or, that the said Master might inquire and report under what circumstances the said several answers of said defendants were filed, and whether the same were necessarily and properly filed, or only with a view to make costs; and in case the Court or the Master should be of opinion that under all the circumstances the said defendants were justified in filing any answers, that the said defendants might be declared entitled to the costs of one answer only, and not to the costs of the said several answers: the said defendant Edward Bateman consenting that the said plaintiffs should be paid the sums found due to them, together with their costs, when taxed and ascertained; and that the said several defendants should be paid such costs as they should be declared or found entitled to, out of the same fund now in Court, or for such other order, &c.

Mr. *R. C. Walker*, for the plaintiffs in the first cause, and Mr. *O'Callaghan*, for several of the defendants, opposed the motion.

The MASTER OF THE ROLLS ordered the bill and several answers to be brought into Court; and after they had been produced by the Officer, and inspected by his Honor, he said he would forbear from making any observation upon this case, as the order he was about to pronounce would sufficiently mark the sense of the Court respecting it.

ORDER:—It is ordered, that it be referred to J. S. Townsend, Esq., the Master in these causes, to inquire and report the amount remaining due to the said plaintiffs in the first cause, after all just credits and allowances, on foot of their legacies, in the pleadings mentioned: the defendant Edward Bateman undertaking to pay the same. And it is further ordered, that the said Master do tax the said plaintiffs' costs in the first cause incurred in proceeding against the defendant Edward Bateman. But his Honor doth declare, that the said Master is not to tax the costs of proceeding against any of the other defendants, the Court being of opinion that such costs were not properly and necessarily incurred. And it is further ordered, that further proceedings in the first cause be stayed in the meantime; and the Court doth declare that the plaintiffs in the first cause are not entitled to charge their costs of appearing on this motion.

CHANCERY.

*Saturday June 13th, 1840.*LANDLORD AND TENANT—ADVERSE CLAIMS TO THE
REVERSION—INTERPLEADER.

RICKARD v. HYDE.

THIS was a bill of interpleader.—The lands, part of which was the subject matter of the suit, were, with others, demised by a lease of the 9th April 1748, to an ancestor of the defendants, the Hydes, for lives renewable for ever; several renewals took place from time to time, the last of which was to Robert Hyde, the father of the defendants. And he by lease dated the 23d August 1835, demised 42 acres of the lands to the plaintiffs, for a term of 91 years, at a rent of 17s. 8d. per acre, payable in May and November. Plaintiffs entered into possession under that lease, and paid rent to Robert Hyde until his death. He by his will, dated the 23d November 1835, reciting that by virtue of the settlement executed on his marriage, he had power to devise the lands comprised in the original lease of 1748 to any of his children, and to charge them with £1000 for each of the other children, in the event of his devising the entire to any one child,—devised the entire of those lands to his second and third sons, the defendants, William and George Hyde, and died on the 27th April 1836, leaving the defendant Robert Nicholas Hyde his heir-at-law. The plaintiffs had paid the rent which was to fall due in May 1836 in advance to the testator. Shortly after the death of the testator, the defendant R. N. Hyde set up a claim to the lands as heir-at-law, alleging that the will was not duly executed, as the testator had been for some time previous to its date incompetent to make any will; and insisting that if any settlement had been executed on the marriage of his father, that he was entitled to the lands by its provisions, in default of appointment; and on the 12th September 1836, he served notice on the tenants to pay the accruing rents to him. The plaintiffs had, upon the requisition of the agent of the head landlord, paid their proportion of the head-rent due on the 1st May proceeding; and on the 2d November 1836, the defendants, the devisees, distrained for the balance, which plaintiffs paid them, without having replevined the distress. In the next May the same occurred, and before the second November gale accrued due the plaintiffs filed the present bill, with the usual affidavit denying collusion, and paid the amount of the rent into Court. The defendant R. N. Hyde, the

Where a tenant is threatened with adverse claims to the rent by persons claiming the reversion, he is entitled to file a bill of interpleader, and pay the rent into Court, although one of the claimants insists that the lease under which the tenant holds is void against him.

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This is a very fair case for coming into a Court of Equity, and the usual decree* in such cases must be pronounced. The form is settled in a reported case, the name of which I do not recollect at present. As to Mr. Brooke's argument, that his clients claim to be entitled to set aside the lease as fraudulent, that is no reason for refusing the relief sought. The tenant was entitled to come into Court to set up his title to this lease, in order to ascertain who was the party entitled to the rent reserved by that lease; and the decree in this cause, or the result of the litigations between the heir and devisee, will not affect the right to set aside that lease, if there be ground for setting it aside. A tenant cannot divest himself of his character as against his landlord; but here his difficulty is, that he does not know who is his landlord.

As to the plaintiffs' right to deduct their costs in the cause out of the fund brought into Court by them, I shall reserve that question until the result of the litigation between the heir and the devisees is ascertained, in order to enable the devisees to make out the case of collusion between the plaintiffs and the heir; but the heir, being out of the jurisdiction, must give security for costs.

[A discussion then arose as to the mode in which the litigation was to be conducted, but it was ultimately arranged that the heir should bring an action of ejectment; and it appearing that he was entitled to a sum of £100 under the will, it was agreed that that sum should stand as a security for the costs.]

* The form of the usual decree in interpleader cases is given in *Seton on Decrees*, p. 339, but the Reporter has not been able to discover the case to which the Lord Chancellor alluded. In the case of *Dawson v. Hardcastle*, 2 Cox, 279, the notes of a decree are given as having been pronounced in the case of *Hackett v. Webb & Willey*, Cha. Rep. 257; and the notes of the decree in that case of *Dawson v. Hardcastle* are given in the report in *Cox*, directing that the costs of the plaintiffs and of the defendants who succeeded in the suit should be paid by the unsuccessful defendants. In *Coutan v. Williams*, 9 Ves. 108, in which the bill was filed by a tenant, he was allowed to retain his costs out of the rent in his hands, and the unsuccessful defendants were ordered

to pay the costs of the other defendant, together with the amount retained out of the rent. In *Mason v. Hamilton*, 5 Sim. 19, the defendants who by their claims occasioned the suit and failed in sustaining it, were directed to pay the costs of the innocent defendants, and of the plaintiffs. In *Smith v. Hammond*, 6 Sim. 12, an order was made, referring it to the Master to ascertain whether the defendant whose claim occasioned the suit had any and what claim on the fund, and that he being in the situation of a plaintiff, and resident abroad, should give security for costs to the amount of £100, and that the plaintiff's costs should be paid out of the fund, without prejudice to the question by whom they should be ultimately paid.

Saturday, June 20th.

STATUTE OF LIMITATIONS - PRIOR CREDITOR IN POSSESSION—
CONSTRUCTION OF ACT—PLEADING THE STATUTE—
NECESSITY OF IN CREDITOR'S SUIT.

DROUGHT v. JONES.

THE bill in this cause was filed on the 21st of February, 1837, by a judgment creditor of Edward Armstrong, deceased, for the purpose of obtaining payment out of his real and personal estates. The usual decree had been pronounced, under which the Master made his report, finding that there was no personal estate, and that there was due to the defendants Richard Rennell, Thomas Barnes, and R. A. Rennell, as executors of an annuity creditor of Armstrong, three years'-and-a-half arrears of an annuity mentioned in the report, being the amount that had accrued due during the six years next preceding the filing of the bill. To this report an exception was taken, and the question was, as to the applicability of the 42d section of the statute of limitations 3 & 4 W. 4, c. 27, to this case. Edward Armstrong being seized of the lands of Eriss, under a lease for lives renewable for ever, at a rent of £368. 10s. 9d., four judgments affecting the said lands, had been assigned previously to 1812 to Edward Fetherstone, as a trustee for Cuthbert Fetherstone, which the Master's report found to be the first incumbrances on the lands of Eriss; and in Michaelmas 1813, and Hilary, 1814, Edward Armstrong confessed two judgments to the plaintiffs, which the report found to stand next in priority to Fetherstone's judgments. By deed of the 18th March 1814, which was admitted to have been executed for the purpose of further securing to Fetherstone the amount of those judgments, though stated in the deed to be for securing £2,000 previously advanced by Fetherstone, Armstrong conveyed the lands of Eriss to Cuthbert Fetherstone, upon trust, in the first place, to pay the head-rent and renewal fines; and after payment of these and all other out-goings to apply £500 per annum in payment, in the first place, of a debt of £200 due by Armstrong to Messrs. Reeves and Ormsby; and subject to that charge, to apply the £500 in payment of the interest, at 6 *per cent.*, upon the money due on foot of the judgment, and the residue in discharge of the principal, and to hand over the surplus rents, after deducting the £500 per annum, to Edward Armstrong. In 1814, Edward Armstrong entered into an agreement with Richard Rennell for the sale of an annuity of £100 during his (Armstrong's) life; and it was agreed that the annuity should have priority over the sum due to Cuthbert Fetherstone, whose concurrence Armstrong undertook to obtain for that purpose; and accordingly, by a deed dated the 1st November 1814, which

A. being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estate did not join in the demise. A. remains in possession until the death of the grantor of the annuity.

Held, that the annuitant was not debarred from recovering more than six years' arrears.

The statute of limitations should be construed strictly by Courts of Equity. As to the necessity of relying on the statute in the answer, in order to entitle a party to set it up in the office, *quære*.

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purported to be made between Edward Armstrong, Cuthbert Fetherstone, and Edward Fetherstone, of the first part; Richard Rennell (the annuitant), of the second part; and Henry Gresson, his trustee, of the third part, Armstrong granted an annuity of £100 for his life to Rennell, charged upon the lands of Eriss; and he and the two Fetherstones demised those lands for a term of 99 years to Gresson, as trustee for the annuitant.

The deed was executed by Armstrong and Cuthbert Fetherstone, but was not executed by Edward Fetherstone, in whom the legal estate was vested, under a deed of the 29th March 1812.

Shortly after the deed of March 1814, Cuthbert Fetherstone entered into possession of the lands, and continued in such possession until a receiver was appointed in this cause in May 1837, and paid the head-rent and renewal fines, and discharged the debt due by Armstrong to Messrs. Reeves and Ormsby, and the interest on the money due to himself, but no part of the principal was paid off. The annuity was paid by him down to the year 1823, when the lands became insufficient to pay more than the head-rent and other outgoings; and from that time no payment had been made. Edward Armstrong, the grantor, died in 1834, and the Master found that the defendants, Richard Rennell, Thomas Barnes, and R. A. Rennell, the executors of the annuitant, who had died before the filing of the bill, were not entitled to more than three-and-a-half years' arrears of the annuity, being the amount that had accrued due during the six years immediately preceding the filing of the bill. To this report the defendants, the executors of the annuitants, excepted, and the question was as to the applicability of the 42d section of the statute of limitations, 3 & 4 W. 4, c. 27, to the case.

Mr. *W. Brooke*, Q. C., and Mr. *Gresson*, for the defendants, the executors of the annuitant. —

We are not here as plaintiffs, but as specific incumbrancers, having a lien on the lands; and against a party having a lien the statute does not run. In the case of *Murphy v. Sterne* (a), your Lordship decided that the plaintiff could not set up the statute of limitations against a party made a defendant, as having a specific lien on the lands; and that the defendant could not be compelled to relinquish that lien until he was paid all that was due to him. The same principle has been recognised at law in the case of *Spiers v. Hartley* (b), and that case was followed in the case of *Higgins v. Scott* (c). In the latter case, there was no possession in the party claiming the benefit of the lien—there was a mere constructive lien.

(a) 1 D. & W. 236.

(b) 3 Esp. 81.

(c) 2 B. & Ad. 213.

[LORD CHANCELLOR.—The authorities you mention do not appear to me to be applicable to the present case; they were all decided before the passing of the recent statute of limitations.]

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We come within the exception in the 42d section of the recent statute, as to prior creditors being in possession. That section enacts, "That where any prior mortgagee or other incumbrancer shall have been in possession of any lands, or in receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or other incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

Cuthbert Fetherstone was in possession for twenty-three years; but on the other side, they say he is not a prior creditor, as he joined in the annuity deed and granted a term, and that we might have filed a bill to assert our priority. But he was in possession for the purpose of paying rent and renewal fines antecedent to his own claim; and for the three years after the death of Armstrong, the outgoings exceeded the income of these lands. He had the legal estate in his trustee, and he was trustee for the landlord and for Messrs. Reeves and Ormsby, who were prior to us, and he could at any time have been evicted by the prior judgment creditors. Besides, the defendant Fetherstone ought not to be allowed to set up the statute of limitations, as he did not rely on it in his answer. In the case of *Welsh v. Welsh* (a), it was decided by the Court of Exchequer, that a defendant who does not rely on the statute of limitations in his answer, cannot resort to it in his discharge.

Mr. Smith, Q. C., and Mr. Cooke, for Cuthbert Fetherstone.

In the case of *Murphy v. Sterne*, the suit had been instituted prior to the passing of the statute of limitations, and it was upon that ground the decision proceeded; but that is not the case here. The bill was not filed until 1837; and besides, this is a creditor's suit, and a party coming in under it is *quasi* a plaintiff, and must establish his claim, as in ordinary cases. The debts secured by the judgments confessed in 1812, and by the conveyance to Fetherstone in 1814, were the same: the mortgage was only an additional security. The recital in the deed of 1814 amounts to a covenant, on the part of Cuthbert Fetherstone, to give

(a) 1 Jones & Carey, 232.

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priority. The deed recites the agreement on the part of Armstrong, to procure Cuthbert Fetherstone to give priority to his annuity, and that he had consented to do so; and he then joins in conveying the lands to a trustee for the annuitant. The defendants, when the funds are to be allocated, will claim priority to us under the deed, although now they allege that we are in possession as prior creditors. The statute of limitations ought to be construed favorably by Courts of Equity, and a party seeking the benefit of any exception in it must bring himself strictly within the terms of it. Although there may have been a legal obstacle in the way to his asserting his priority, he might have filed a bill for that purpose, and have obtained a receiver.

[LORD CHANCELLOR.—He could not by any legal proceeding remove Fetherstone from the possession, nor could he proceed by distress. Then, as to his right to remove him by any equitable proceeding, that was confessedly subject to the performance by Fetherstone of trusts which, by the agreement of the parties, were prior to the defendants' charge, namely, the payment of the head-rent and the debt to Reeves and Ormsby; and the difficulty I feel is in deciding that the exception in the 42d section does not apply to the case, when the party does not enforce to its fullest extent every equitable right that he has.]

Mr. Cooke.—The only trust intervening between the payment of the head-rent and the claim of the annuitant was soon paid.

Mr. Sergeant Greene and Mr. Leahy, for the plaintiff, stated that he was not in the events that had occurred interested in the question.

LORD CHANCELLOR.

As to that decision in the Exchequer, which has been cited in the course of this argument, to shew that the defence of the statute of limitations could not be set up in the office when it had not been relied upon in the answer, I would require to have that proposition fully considered before I adopted it in its full extent. The consequences to creditors in the administration of assets in the office would be quite alarming. It may be quite right to apply it in a case between plaintiff and defendant, but it seems to me to be impossible to apply it in a case like the present.

As to the principal point discussed, the only question I have to decide is as to the meaning of the exception in the 42d section of the statute of limitations. Now, the annuitant here, in my opinion, falls strictly within the literal terms of that exception, and I do not think there is any thing in the circumstances of this case to deprive him of the benefit

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of that exception. Since the execution of this deed, there was a person in possession under a legal right derived under a prior title. But it is said, that from the agreement of the parties, it was in the power of the annuitant, whom the defendants taking the exception represent, to have prevented the operation of the legal bar. Now, I am not satisfied that it was so in his power. It is admitted that he could not get over the legal bar by any proceeding at law, and that his right to set it aside was merely an equitable right. He could not recover possession of the land by ejectment, as the trustee in whom the legal estate was vested did not join in the demise to his trustee; and, for the same reason, he could not distrain. But it is said that he might have filed his bill. Even admitting that he might, I am not bound to give to a section creating a flat statutable bar, a stringent construction which does not necessarily follow from the words of that section. Now, in this case, I do not think that he had even an equitable right to obtain the possession of these lands. Fetherstone might, in opposition to such a claim, have set up the existence of trusts which, by the agreement of all parties, were confessedly prior to the charge of the annuitant: and, down to 1823, he might have said that he had applied the rents, as far as they would extend, in performance of those trusts. From 1823, the lands were not more than sufficient to pay the head-rent. Under these circumstances, I am bound to

Allow the exception.

Tuesday, June 23d, and Wednesday, June 24th.

**PRINCIPAL AND SURETY—DISCHARGE OF SURETY—
GIVING TIME TO PRINCIPAL.**

LINDSAY v. LORD DOWNES.

THE bill in this case stated that in the year 1817, Lord Oriel being entitled to estates producing about £8000 per annum, and having become embarrassed in his circumstances, vested his estates in the late Lord Downes, as a trustee for the payment of his debts; and that Robert Lindsay was, on the recommendation of Lord Oriel, appointed by Lord Downes as agent to the trust estates. That on the 14th February 1818, a bond was

A creditor having the security of a third person for the due accounting of an agent, settled accounts with that agent, and takes from him a bond for the

balance found to be due, and bills at different dates for the amount of the bond, and the interest thereon until the last of the bills should fall due; and at the same time stipulates that he is at liberty at any moment to proceed on the original security. *Held*, that this was not a discharge of the surety.

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executed by Robert Lindsay as principal in the sum of £8000, and six sureties in £1000 each, one of whom was the plaintiff;—conditioned for Robert Lindsay's duly accounting as agent, and paying over to the trustees the monies which he should receive. That Robert Lindsay continued in the agency until the death of Lord Downes in the month of March 1826, and that an account was settled in a few days after the death of Lord Downes, between R. Lindsay and the defendant Walter Hussey Griffith, as the executor of Lord Downes, upon which there appeared a balance of £3417. 17s. 10d., due by R. Lindsay, and a bond was executed by him for that sum to Griffith and the defendant, the present Lord Downes, as executors of the late Lord. That the balance thus found due was composed principally of monies paid to or for the use of Lord Oriel; and an annuity to which he was entitled was subsequently applied in payment of that balance, and various payments made, which it is immaterial to mention particularly. That although there was no formal appointment of R. Lindsay subsequent to the death of Lord Downes, he continued in receipt of the rents until the 15th May 1827, when another account was settled between him and W. H. Griffith, as the executor of Lord Downes, upon which there appeared to be a balance of £1156. 15s. 2d. due by R. Lindsay; and upon that occasion another bond for that amount was executed by R. Lindsay, and a mortgage of some real property executed to Griffith, and at the same time several bills of exchange at different dates and for different sums, amounting altogether to £1242. 1s. 10d. were given by R. Lindsay to Griffith, who acknowledged the receipt of them by the following memorandum:—

Dr.
Robert Lindsay in account with W. H.
Griffith.—1827, May 11th.
To balance on account due executors
of Lord Downes, £1156. 15s. 6d.

By bond of this date for £1156. 15s. 2d. Cr.

“Mr. Lindsay having proposed to pay the amount of the above bond, “I have received from him sundry bills, particulars as endorsed on “this paper, which when paid will be in full for the above bond, with “interest to July 1829; for guarantee of which bills I have received “the above bond, and also a mortgage on Mr. Lindsay's farm, both “which become discharged on the bills being duly paid. But I do not “consent to being prevented from proceeding at any moment on the “original securities for Mr. Lindsay's sufficiently accounting as receiver, “and for the due payment of the rents to be received by him of Lord “Oriel's estate, vested in the late Lord Downes as trustee; nor to do “any act which would exonerate the securities of Mr. Lindsay from their “responsibility.”

On the other side were the particulars of the bills, amounting to £1242. 1s. 10d., the last of which was payable on the 21st July 1829.

The bill which was filed by one of the sureties in the bond of 1817, prayed a declaration that the plaintiff was discharged therefrom by the acts of the executors of Lord Downes, and that the same might be given up to be cancelled; and that satisfaction of the judgment entered up against the plaintiff thereupon might be entered upon the record; or that a perpetual injunction might be awarded to restrain the defendants from proceeding upon the judgment; and in the alternative, that in case the Court should not be of opinion that the acts of the executors operated as a discharge, then that an account might be taken of what was due by plaintiff on foot of the bond.

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Mr. Warren, Q. C., Mr. Collins, Q. C., and Mr. Lindsay, for the plaintiff.

The effect of the dealing between Griffith and R. Lindsay was to give time to the latter, the principal debtor, without the consent of the surety, and in such case a Court of Equity considers the surety as discharged; *Nisbett v. Smith* (a); *Samuel v. Howarth* (b). In the latter case the Lord Chancellor lays down the rule thus: "If a creditor without the consent of the surety gives time to the principal, he thereby discharges the surety,—and for this reason, because the creditor by so doing has thereby put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not."

It is true, that mere gratuitous forbearance will not be sufficient, there must be a binding contract to give time. And in Courts of Law a contract by specialty, as this is, cannot be varied or suspended by an agreement not under seal, but a Court of Equity looks upon all contracts for valuable considerations as equally binding; and here the creditor received from the principal debtor negotiable securities for the entire debt, and for the intermediate interest, until the time fixed for the payment of those securities; and the taking interest by anticipation prevents the creditor from suing either principal or surety during the time for which he so received interest by anticipation, *Blake v. White* (c); *Rees v. Berrington* (d). At law, if the original debt were by simple contract, the taking bills from the debtor would suspend the right of action against him upon the original debt during the currency of the bills. The authorities to that effect will be found collected in *Chitty on Contracts* p. 593, 3d ed. Where the original debt is by specialty, the form of it forces the debtor into a Court of Equity, in consequence of the rule at law that specialty contracts can only be varied by a security of as high a nature. If Griffith had proceeded at law upon

(a) 2 B. C. C. 579.

(b) 3 Mer. 272.

(c) 1 Yo. & Col. 420.

(d) 2 Ves. jun. 540.

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the original security during the currency of the bills, Robert Lindsay might have applied to this Court for an injunction to restrain them, which, according to the doctrine in *Rees v. Berrington*, and *Blake v. White*, would have been granted. It may be said that here the creditor has expressly reserved his right to proceed against the surety, but without the consent of the surety such a reservation is absolutely void; *Boutbee v. Stubbs* (a). In the case of *Bowmaker v. Moore* (b), sureties in a replevin bond were held to be discharged by a reference to arbitration without their assent, although there was an express reservation of the right to proceed against them; and a similar decision was made in the case of *Archer v. Hall* (c). The question is fully discussed by Mr. Theobald in his work on *Principal and Surety*, p. 208.

Mr. Gilmore, Q. C., Mr. Blake, Q. C., and Mr. Wall, for the defendants, the executors of Lord Downes.

The question in all cases of this nature is, whether there has been a binding contract to give time to the principal? whether the hand of the creditor has for any period been tied up from taking any proceeding against the principal debtor? But mere acquiescence or forbearance for any length of time will not discharge the surety, neither will the taking a further security have that effect, *Byre v. Everitt* (d); in that case the Lord Chancellor says, "I have never known a case in which, "where a principal and surety were indebted on the same bond, a dealing "with the principal, considering him as a debtor in another sum of money, "or for another security, was held to discharge the surety in the first "obligation." At law a simple contract debt is merged by the acceptance of higher security for the same debt, where the remedy given by the latter is co-extensive with that given by the former. But even at law, when it appears to be the intention of the parties that the original security should remain in force, the new one has not the effect of extinguishing it; *Solly v. Forbes* (e). As to the effect of taking the second bond here, the plaintiff could not have been injured by it, as it was payable *instantly*, and there was no stay of execution, and the remedy against the principal debtor was thereby accelerated. As there was no binding contract for time, therefore, the acceptance of a further security of the same nature does not affect the right of the creditor to proceed against the surety; *Troopenny and Young v. Boys* (f). In the case of simple contract debts, at law the taking of bills is either a suspension of the remedy, or a satisfaction of the original debt, but it is no defence to an action on a specialty. This Court, however, we admit, views the matter differently; and if time were substantially given to the principal

(a) 18 Ves. 20.

(c) 4 Bing. 464.

(e) 2 Br. & B. 38.

(b) 3 Price, 214.

(d) 2 Russ. 381.

(f) 3 B. & Cr. 208; S. C. 5 D. & R. 251.

under a binding contract, will restrain the surety; *Heath v. Key* (a). There are several analogous cases at law upon bills of exchange, and in all the principle is admitted, that unless the obligation to give time was binding, the surety is not discharged.

The mere payment of interest upon the original debt under a voluntary agreement to give time upon the terms of the intermediate interest being paid, does not discharge the surety; *Philpott v. Briant* (b); and the same was held by the late Chief Baron Joy, in the case of *Cooper v. North* (c). There is no evidence here that the bills given to Griffith were negotiated by him.

[LORD CHANCELLOR.—If that fact should appear to be material I shall direct an inquiry upon the point.]

Mr. Warren, for the plaintiff, declining an inquiry—

[LORD CHANCELLOR.—Then I must consider any argument resting on that as out of the question.]

The doctrine of Courts of Equity with respect to the effect of dealings between the creditor and the principal debtor, is a refinement which at present the Court is not disposed to extend; *Hulme v. Peploe* (d).

Mr. Lindsay, in reply, cited *Beresford v. Bank of Ireland* (e), and *Eyre v. Hollier* (f).

LORD CHANCELLOR.

The object of this bill is twofold; to have the bond which was executed by the plaintiff as a surety for the due accounting of the late Mr. Robert Lindsay for all rents received by him as agent to the trustees of Lord Oriel cancelled, and a perpetual injunction awarded to restrain the defendants, the executors of the late Lord Downes, from suing the plaintiff upon it; or, in case the Court should think that the plaintiff was not altogether discharged from his liability as surety, then that the usual accounts may be taken of what is due on foot of the bond, and for an injunction in the mean time. The latter part of the relief sought, the plaintiff is clearly entitled to; but as to the perpetual injunction, it is, in my opinion, quite out of the case. The usual way of putting the question which has been argued in this case, namely, whether time has been given, is a foolish way of putting it; and the Courts are obliged

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(a) 1 Y. & Jer. 434.

(c) 2 Jones, 210.

(e) 6 Dow. 233.

(b) 4 Bing. 717.

(d) 2 Sim. 12.

(f) Ll. & G. Cas., temp. Plunket, 250.

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tacitly to admit that, when they rest their decisions upon the point, that there has or has not been a binding contract to give time. The real question is, whether by the dealings between the creditor and principal debtor, the former has changed the situation of the surety to such an extent as to injure his chance of recovering the amount of the debt from the principal, by proceeding in the name of the creditor, in case he were to pay that amount himself to the creditor? Mere delay on the part of the creditor to enforce his rights against the principal debtor will not have that effect, nor will taking a fresh security for the original debt. I admit that it might be different if the creditor took a substituted security. But here the creditor expressly saves himself from any such consequences by express stipulation. By the memorandum he expressly reserves his claim against the principal and against the surety. It is doubtful whether he could reserve his right against the surety alone, as he was not a party to the agreement, but he has reserved his right to proceed against the principal. The surety, therefore, was not in any way injured, for neither taking a fresh bond or taking notes could affect his right; and even if the notes had been negotiated, the only effect of that would be, that the creditor would be bound to give credit for the amount of such as were negotiated; and in the course of the argument I asked the counsel for the plaintiff whether they would take an inquiry upon the subject, which they answered in the negative. It is said, that it is inconsistent in the creditor to seek to proceed against the surety, after having so dealt with the principal as to disable himself from doing full justice to the surety, if he had been desirous of paying off the debt, and proceeding against the principal in the name of the creditor;—the answer to that is, that here he has not, in any way, injured the surety, because he has expressly reserved his right of proceeding against the principal at any moment. I, therefore, think that no perpetual injunction can be awarded, but that an account must be directed; and the plaintiff is, of course, entitled to an injunction pending that account.

EQUITY EXCHEQUER.

*Thursday, November 7th.—Friday, November 15th.*RELEASE—GIFT—DEBT—ANNUITY—JOINTURE—
SETTLEMENT.

LANGLEY v. LANGLEY.

By indenture of settlement, dated the 1st of September 1800, executed previously to the marriage of Lawrence Grace Langley with Miss Susanna Taylor, certain lands and premises were conveyed to trustees, for the purpose of providing a jointure or annuity of £200 for the said Susanna Taylor, in the event of her surviving the said L. G. Langley, her intended husband, which jointure or annuity was secured, in the usual manner, by a long term of years.

L. G. Langley died in 1809 intestate, leaving the said Susanna Langley, otherwise Taylor, his widow, and Henry Augustus Langley, his only child by a former wife, surviving. Upon the death of his father, Henry Augustus Langley, as heir-at-law, became seized in fee of the said lands and premises, subject to the annuity payable to his step-mother.

Henry Augustus Langley died in 1834, having by his will charged his real estates with the payment of several annuities, among which was one of £200 a-year to his step-mother, the said Susanna Langley. By a codicil to his will, however, the testator stated that he found his unsettled lands and estates to be inadequate to the payment of the several annuities which by his will he had so charged thereon, and that he

S.L., to whom, by settlement (executed in 1800), an annuity of £200, by way of jointure, was secured in the event of surviving her husband, continued, for many years after her husband's death (which took place in 1809), to receive payment of the same from the hands of her step-son, H. A. L., the inheritor of the estate upon which the annuity was charged. In 1830, the annuity being then two years in arrear, S.

L. wrote a letter to her step-son, wherein, after expressing her wish to do what she could to serve him, she stated that she would feel happy in thenceforth giving up the £200 annuity which he had paid her since her husband's death, and would also make him a present of the £400, the amount of the arrears then due.

In 1834 H. A. L. died. By his will he charged his real estates with the payment of an annuity of £200 to his step-mother. By a codicil, however, after stating that he had been most reluctantly constrained by circumstances to alter the bequest, he substituted a reduced annuity of £100 for the annuity of £200 granted by his will. The bequest of the smaller sum was accompanied by a declaration, that it was upon condition that S. L. should not seek to raise the annuity of £200 secured by the settlement of 1800, which, the testator stated she had, in a letter written long since, expressed her intention to relinquish in his favor.

S. L. died in 1837, having previously made her will, and thereby appointed the plaintiff her residuary legatee and sole executor.

It appeared that S. L. had never sought for or demanded either the annuity secured by the settlement, or that granted by the will, after the date of her letter in 1830.

The plaintiff having filed a bill to raise the arrears of the annuity secured by the settlement, the Court dismissed it, so far as it claimed relief in respect of the arrears which accrued in the lifetime of H. A. L., but directed an account of what was due from his death to the death of S. L.

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thought it right to abate and reduce the same, which he accordingly did. In reference to the bequest to his step-mother, the testator stated that he was most reluctantly obliged to alter and limit the devise and bequest of the annuity of £200 granted by his will to the said Susanna Langley to £100 annually, which latter sum he devised and bequeathed to the said Susanna Langley for life, upon condition, however, that she should not seek to raise the annual sum of £200 secured upon and payable off his estates by the settlement of 1800; which annual charge or sum of £200, the testator observed that she, the said Susanna Langley, had, in a letter written long since, expressed her intention of relinquishing all right and claim to in his favor; and which right, if she should resume, the testator declared that he reluctantly revoked all and every bequest and annuity thereby, or by his will, given to the said Susanna Langley, inasmuch as his the said testator's lands would be unable to meet and discharge the same.

The letter referred to in the above codicil bore date the 8th of November 1830, at which time Mrs. Langley's annuity was two years in arrear. The letter was addressed by Mrs. Langley to her step-son the testator, and after acknowledging the receipt of certain profit rents payable by the latter to the writer, it proceeded thus:—"I fear you must be often inconvenienced in consequence of the large payments you have to make me. Now, as it is my wish to do what I can to serve you, I shall feel quite happy in giving up henceforth the £200 annuity which you have paid me since Mr. Langley's death; and I shall also make you a present of the £400 due last June 1830, of the said annuity, which I did not wish to call on you for payment of, the times being so very bad, and the great expense you have had in building."

Susanna Langley died in March 1837, having nominated and appointed the plaintiff residuary legatee and sole executor of her will, which bore date the 31st October 1835.

The bill in this cause was filed by the plaintiff, as such residuary legatee and executor of Susanna Langley, and claimed an arrear of £1500 as due on foot of the annuity of £200 secured by the settlement of the 1st of September 1800. The bill prayed for an account of what was due to the plaintiff in respect of such arrears, and in default of payment of the sum which should be found due, for a sale of the lands comprised in the term whereby the annuity was secured.

The question raised by the answers was as to the effect of Mrs. Langley's letter of the 8th of November 1830. It was contended that she had thereby relinquished the annuity of £200 granted by the settlement of 1800, and the arrears thereof, to all intents and purposes, and had given up to H. A. Langley all her rights and interest therein. It was therefore submitted, that the lands and premises so charged with

the payment of the said annuity became, and were thenceforth discharged therefrom. It was also suggested, that the plaintiff was only (if at all) entitled, as executor of Mrs. Langley, to the arrear of the annuity of £100 devised to her by the will of H. A. Langley, in lieu of the annuity so secured by the settlement.

It did not appear that Mrs. Langley, from the date of her letter of the 8th of November 1830, had ever claimed or sought for the annuity of £200 secured by the settlement, or the reduced annuity of £100 granted by H. A. Langley's will, nor did she, in her own will, make any allusion to the subject.

Mr. Warren, Q. C., with whom was Mr. Stearne Miller, for the defendant Henry Langley, a minor, the inheritor of the lands charged with the annuity.—The letter of Mrs. Langley operated as a release of the annuity to which she was entitled under the settlement of 1800. In *Wekett v. Raby* (a), the House of Lords, in affirmance of a decree of Lord Macclesfield, upon the evidence of *parol* declarations made by the testator (the obligee) on his death-bed, directed that a bond which the executor had put in suit against the obligor should be delivered up to be cancelled. So, where the testator's son-in-law owed him several bond debts, the Court, upon evidence derived from the testator's accounts, and from letters and other documents in his hand-writing, presumed that the debts had been satisfied; *Eden v. Smyth* (b). Similar decisions were made in *Aston v. Pye* (c), and in the very recent case of *Flower v. Marten* (d), in which all the previous authorities are collected. If the Court be satisfied upon the evidence, that to the latest moment of this lady's life, she did not retract the renunciation of her claim contained in her letter, but, on the contrary, intended the same as a gift to her step-son, it will not now permit her personal representative to revive a claim which his testatrix had abandoned. With respect to the arrear of £400 mentioned in the letter, there can be no question as to Mrs. Langley having released her right to it.

Mr. W. Brooke, Q. C., and Mr. Rolleston, for the plaintiff.—The annuity having been created by deed, can only be discharged or released by an instrument of as high a nature. The old rule, that *eodem modo quo ligatur eodem dissolvitur* (e), must, therefore, govern this case, as the authorities which have been cited do not apply. According to the judgment of Sir W. Grant in *Reeves v. Brymer* (f), there must in all

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(a) 2 Bro. P. C. 386, Toml. ed.

(b) 5 Ves. 341.

(c) Stated in *Eden v. Smyth*, p. 354.

(d) 2 Mylne & Cr. 459.

(e) See *Cupit v. Jackson*, 13 Price, 721; S. C. C. 1 M'Clel. 496.

(f) 6 Ves. 516.

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such cases either be evidence of an antecedent release, or some testamentary paper declaratory of the testator's intention to relinquish the demand, the payment of which is sought to be enforced after his decease. Now in this case there are no circumstances which can be considered as amounting to evidence of an actual release, and the letter of Mrs. Langley cannot be considered as a testamentary paper. The decision of Lord Loughborough in *Eden v. Smyth*, relied on at the other side, does not apply, for there was evidence in that case of a past release. In *Reeves v. Brymer*, Sir W. Grant says,—“In *Eden v. Smyth* there “was a letter of Mr. Smyth, in which he declared he *had* released. “That was good evidence, from which it might be inferred that an actual “release was executed.” So what is said by Sir W. Grant as to the necessity of there being in such cases either evidence of an actual release or a testamentary paper, exactly corresponds with what is laid down by Lord Loughborough himself in *Byrne v. Godfrey* (a). His Lordship there says—“I am afraid of this case, for it really amounts to this; it “is setting up the parol declaration of the testator to defeat the will.”—“It is not an actual release at any one given time, so that I can state “that the debt was gone by the act of the person to whom it was due; “nor is it a legacy.” His Lordship adds—“I wish I could have decided “the other way; for it was clear what the intention was, but the great “danger of the case makes it impossible.” Lord Loughborough in the same case explains the grounds of the decision in *Whit v. Raby*, clearly shewing that it is not an authority for the defendants here.

The documentary evidence in the present case excludes the supposition that a release was executed; first, Mrs. Langley's letter contains no expression from which it could be inferred that she *had* executed a release, the language relating merely to the future; secondly, the codicil to H. A. Langley's will bequeathing a reduced annuity of £100 to Mrs. Langley *upon condition* that she should not seek to raise the annuity of £200 under the settlement which she “had expressed her *intention*” to relinquish, shews that the testator himself did not understand her letter as amounting to an actual or absolute release of the latter annuity.—[RICHARDS, B. May it not be argued that the letter operated as a *personal* release to this gentleman during his lifetime, without, however, exonerating the *estate* upon which the annuity was charged?—That is the utmost the defendants can contend for; but it is submitted that from the total absence of a consideration in this case, the letter cannot under any circumstances be held to operate as a release; *Heathcote v. Crookshanks* (b); *Tufnell v. Constable* (c). In *Hooper v. Goodwin* (d), although the intestate's brother by letter expressed his *intention* of relinquishing

(a) 4 Ves. 11.

(b) 2 T. R. 24.

(c) 8 Sim. 69.

(d) 1 Swanst. 485; S. C. 1 Wils. 212.

his share of the personal estate to the widow, it was held not to amount to a gift. The two last cases are not distinguishable from the present.

Mr. *Stearns Miller*, for the defendant Henry Langley.—As to the application of the old rule of *codem modo*, &c., it is to be observed, that the relief sought by the present bill is for the sale of the term securing the jointure; and as such a term could, within the statute, have been created by a note in writing, so can it be released in the same way; *Ferner d. Earl v. Rogers (a)*. The several cases relied upon as shewing that declarations were not held as amounting to a release were all cases of *parol* statements. The following distinction is taken in *1st Hovenden's Supplement*, p. 425, in a note upon the case of *Byrnes v. Godfrey*, one of the cases cited on the other side:—“The plain distinction between the present case and *Eden v. Smyth* is, that in the principal case, the evidence only went to verbal declarations of the testator, to which it was felt impossible to give the effect of a release; whilst in *Eden v. Smyth*, collateral accounts and papers in the hand-writing of the testator were produced.” Even admitting the argument against the letter operating as a release past derived from the codicil to the will of H. A. Langley, yet, from the subsequent conduct of the parties, and the absence of all evidence of revocation on the part of the releasor, that letter will, in a Court of Equity, be upheld as discharging the subsequent sales of the annuity. The codicil also puts a construction upon the letter, and shews the understanding of the parties up to the time of the death of H. A. Langley, the releasee. Although the will of Susanna Langley, the releasor, bears date more than a year subsequent to the death of the releasee, and although it enumerates, *seriatim*, every debt owing to her, and the minutest portion of her property, yet it makes no mention whatever of the arrears of the annuity; and there is no evidence of a demand of the arrears having been made by her in her lifetime. As to there being no consideration for the release, the present case is between two volunteers; and even if it were otherwise, the distinction taken by the Courts upon that point is, that if the transaction be in itself complete, it will not be disturbed in a Court of Equity for want of consideration; *Collinson v. Patrick (b)*; *Fortescue v. Barnett (c)*.

Mr. *Keatinge*, Q. C., Mr. *W. H. Griffith*, and Mr. *Edward Pennefather*, jun., for annuitants claiming under the will of H. A. Langley.—

Hooper v. Goodwin is distinguishable from the present case, as there was proof of an intention to do a further act. H. Goodwin

(a) 2 Wils. 26; Buller's N. P. 110; Espin. N. P. 467.

(l) 2 Keene, 123.

(c) 3 Mylne & K. 36.



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intended to execute an instrument of release, but the intention was held not to be enough. The gift there was inchoate and imperfect, but here it is complete. The case of *Thynell v. Constable* is also distinguishable. That was a motion for an injunction before answer, to stay proceedings at law. The Vice-Chancellor said that the plaintiff gave no consideration for the alleged release, and that as he was a volunteer he had no right to come into equity for relief. It is to be taken that the executors sued on behalf of creditors; besides the case did not come before the Court upon pleadings and proofs, but before answer. This is not a case in which creditors are concerned, but between a mother and stepson, and the Court will look to the relation of the parties. The letter of Mrs. Langley, although it cannot be set up as a release at law, amounts to a release in equity. It was a gift of the money as it became due; just as if H. A. Langley had tendered it, and Mrs. L. had directed him to apply it to his own use. Even at law, a release of a covenant, after breach, or accord and satisfaction, may be pleaded, for that is not a discharge of the covenant but of the breach only, and may be by *parol*; *Henry Petoe's Case* (a); *Blake's Case* (b). In *Aston v. Pye* (c), an entry in the testator's books, that the debtor should pay no interest, nor should he (the testator) take the principal unless greatly distressed, was held, upon evidence of his circumstances to amount to a release of the debt. So in *Sibthorp v. Mozom* (d), that was held to amount to a release in a Court of Equity which could not operate as such in a Court of Law. The cases of *Norton v. Wood* (e); *Gilbert v. Wetherell* (f); *Flower v. Marten* (g); are authorities to the same effect. From these cases, as well as from that of *Leche v. Lord Kilmorey* (h), the principal is to be deduced, that an executor is not to be permitted to set up or revive a claim which, it is clear upon the evidence, the testator himself had abandoned. Mrs. Langley never did any thing during her life to revoke the gift, but all her conduct was in confirmation of her gift. The plaintiff is only a residuary legatee—a mere volunteer,—who ought not to be allowed to defeat the intention of a party under whom he claims. It is true that in *Byrne v. Godfrey* the Chancellor says, he was afraid of that case; he adds, however “If it was the case of a “residuary legatee, there would be much less difficulty;”—but that is this very case.

Nothing can be more unjust than that a party should be called on after

(a) 8 Co. Rep. 77.

(b) 6 Co. Rep. 44; *et vide* *Gore v. Wright*, 3 N. & P. 243.

(c) Stated in *Eden v. Smyth*, 5 Ves. 350.

(d) 3 Atk. 580.

(e) 1 Russ. & Mylne, 178.

(f) 2 Sim. & Stu. 254.

(g) 2 Mylne & Cr. 459.

(h) Turn. & Russ. 207.

a number of years to refund money which he has been allowed to appropriate and expend under the supposition that it was his own. Thus, where the paymaster of a regiment gave credit in a running account with an officer for sums of money as increased pay and allowances, to which, from a misconstruction of a general order, he supposed the officer was entitled, and after having been apprised of his mistake, suffered the officer to remain in ignorance of the fact for four years, it was held in an action by the officer's personal representative, for pay remaining due, that the paymaster was not at liberty to set off the sums for which he had erroneously given credit, against the demand; *Skyring v. Greenwood* (a). The Court will not view family arrangements like dealings between strangers. It cannot look into all the motives and feelings which might actuate the parties in these transactions (b). As to the objection, that this is the case of a volunteer, and that the gift was without consideration, the following distinction is taken by Lord Eldon in *Ex parte Pye* (c)—“It is clear, that this Court will not assist a volunteer: yet, “if the act is completed, though voluntary, the Court will act upon it.” Here the gift was completed. The case of *Cotteen v. Missing* (d), establishes the same principle.

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Mr. Moore, Q. C., for the plaintiff in reply.—*Skyring v. Greenwood* has no application to the present case, as it was decided upon the special ground of the army agents having been guilty of a breach of duty in emitting to apprise the officer that he was not entitled to the increased allowance which they continued to pay him. C. J. Abbot says—“The “defendants have not merely made an error in account, but they have “been guilty of a breach of duty, by not communicating to Major “*Skyring* the instructions they received from the Board of Ordnance “in 1816. I think, therefore, that justice requires that they shall not “be permitted either to recover back or retain the money which they “had once allowed him in account.” *Tufnell v. Constable* is directly in point; and *Hooper v. Goodwin* is not distinguishable on the grounds upon which the defendants have attempted to distinguish it. That case clearly shews that the letter of Mrs. Langley, so much relied on at the other side, cannot, either as a gift or as a release, bar the claim of her personal representative in a Court of Equity.—[PENNEFATHER, B. I think that case has been put upon its true grounds by the counsel for the defendants, viz., that something further remained to be done. The Master of the Rolls observes—“An intention to give is not a gift;—“the evidence” (in that case) “establishes only a clear intention to re-

(a) 4 B. & Cr. 281; S. C., 6 D. & R. 401.

(b) See *Tweddell v. Tweddell*, Turn. & R. 1.

(c) 18 Ves. 149.

(d) 1 Mad. 176.

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"linquish; the testator meant to do a further act, he was preparing to do it; it was not done; the Court cannot supply it. The gift is inchoate and imperfect; not such as can be pleaded at law, or opposed in equity as a bar to a bill for an account by a legatee against the personal representative." That case seems in principle very much like the case of a will of personalty before the recent statute, which, although it need not have been attested at all, was held to be incomplete, if it contained a clause of attestation, and the testator died before the witnesses subscribed it, upon the ground that as much had not been done as the maker had intended.]—At all events, this letter being purely a voluntary promise and without consideration, a Court of Equity will not give effect to it; *Edwards v. Jones (a)*; *Matthews v. L—— E—— (b)*.

Saturday, November 16th.

PENNEFATHER, B.

The Court has considered this case; and so far as regards the gales of the annuity which fell due in the lifetime of Mr. Henry Augustus Langley, to whom the letter of the 8th of November 1830 was written, it is of opinion that the bill ought to be dismissed. We think there was a gift of those gales of the annuity; and although, perhaps, a mere gift would not of itself be sufficient, yet in this case the gift was accompanied by an act, or in other words, executed by the retention of the gales of the annuity by the party who was bound to pay them. He was suffered to act as if the money had been in his pocket—and there is no great difference between such a state of things and the annuitant actually receiving the gales and handing them back again to the terretenant or person liable to pay them. We think it was the clear intention of the testatrix that her step-son should be permitted to retain the annuity; her letter does not allude to any thing ulterior remaining to be done; besides, the gift therein contained was completed and carried into execution from time to time by the retention, with her permission, of the accruing gales of the rent-charge or annuity.

We were a good deal pressed in the course of the argument by the cases of *Hooper v. Goodwin*, and *Tufnell v. Constable*. The former, however, we think distinguishable upon the ground already mentioned, namely, that the gift was incomplete, and that something more was meant to be done. With respect to the latter case it may be observed, that it was very shortly discussed;—it came before the Court upon a motion for an injunction, not on the hearing of the cause; and the attention of the Vice-Chancellor was not turned to those considerations which influence the mind of the Court in the present case. Besides he was

(a) 1 Mylne & Cr. 226.

(b) 1 Mad. 558.

required to restrain a personal representative from enforcing his claims, while we are called on to become active in sustaining them. We conceive that where the testatrix from time to time suffered this money to remain in the hands of Mr. H. A. Langley, it would be an act of injustice now, at the instance of her executor, to call upon that gentleman or his representative to pay it back again. *Skyring v. Greenwood* bears very strongly on this view of the case. It has been alleged that the decision in that case turned upon the fact of there having been a breach of duty in the army agents, in neglecting to apprise the officer that he was not entitled to the money they continued to pay him; but very much of the reasoning in that case applies to the present. Where a party lies by and suffers another in ignorance to expend money under the impression that it is his own, without apprising him of his mistake, it is not a case calling for the interference of a Court of Equity.

With regard to the construction of the letter, we think it applies only to the life-time of Henry Augustus Langley, and that from his death, the plaintiff is entitled to the account he seeks. We think that Mrs. Langley might at any time during her life, have retracted the gift contained in her letter. She might have informed her step-son that her circumstances would not permit her to give up her annuity, and the gift would then have ceased *quoad* those gales in respect of which it had not been executed. In that way, she might have changed her mind had she been so disposed, but she did not do so. We are therefore of opinion that the bill, so far as it seeks an account of what became due on foot of the annuity in the life-time of H. A. Langley, should be dismissed; but as this is the case of an executor, and one moreover which involves some nicety, we think that so far as the bill is dismissed, it ought to be so without costs.

FOSTER B. concurred.

RICHARDS B.

I also fully concur in the judgment which has been pronounced. I think the gift was consummated by the retention of the annuity with the permission and assent of the annuitant. Under the circumstances, I conceive it would not only be against conscience, but against the current of authorities both at law and in equity, to make the party, or his representative, pay back this money, which by the annuitant he had been allowed to retain;—which he had so long been suffered to consider as his own, and induced to spend on the faith that it belonged to him (a).

(a) See accordingly *Brisbane v. Dacres*, 5 Taunt. 152, per Gibbs J. S. P.
Bilbie v. Lumley, 2 East, 469; *Lowry v. Bourdieu*, Doug. 467.

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COURT.—Dismiss the bill so far as it prays relief as to the arrear of the annuity which accrued in the lifetime of Henry Augustus Langley, without costs; and refer it to the Chief or Second Remembrancer to take an account of what is due to the plaintiff on foot of said annuity since the death of said Henry Augustus Langley, to the death of Susanna Langley, deceased, and of prior incumbrances:—And decree the defendant H. Langley entitled to his costs against the plaintiff, and the plaintiff to pay such costs; and if it shall appear on the account before directed, that any sum was due to the plaintiff at the time of filing the bill, the plaintiff to have such costs over, and reserve the consideration of the costs of the remainder of the cause till further order.

Saturday, November 30th.

PRACTICE—COSTS—CONSENT—RECEIVER.

EX RELATIONE.

COLEMAN, Petitioner, v. MASON, Respondent.

ROCHE, Petitioner, v. Same, Respondent.

A consent, the object of which is the allowance of a sum of money paid by a receiver on account of costs, will not be made a rule of Court, unless signed by the *parties* themselves as well as by their attorneys.

MR. M. BARRY moved that a consent should be made a rule of Court.

The object of the consent was, that the receiver, who had been extended to the second matter, should, in passing his account, be allowed credit for the taxed costs of appointing the receiver, which had been paid to the petitioner in the first matter. The consent had been signed by the respective attorneys, but not by their clients.

RICHARDS, B.*

The object of the consent being, that a payment of costs should be allowed, the signature of the attorneys is not sufficient, the practice in such cases being to require the signature of the parties themselves.

No rule.

* *Solv.*

Saturday, November 30th.

COSTS—PROVISIONAL ASSIGNEE—INSOLVENT.

SPROULE v. OATS and others.

FORECLOSURE suit. One of the mortgagors having become insolvent, the provisional assignee was made a defendant in the cause, and an answer put in for him by the plaintiff.

Mr. H. Ellis, as counsel for the provisional assignee, at the hearing of the cause, applied for his costs, and cited *Peake v. Gibbon* (a).

RICHARDS, B.

Let the defendant have his costs against the plaintiff, the plaintiff to have them with his own over against the fund.

(a) 1 Taunt. 505.

See *Conlan v. Jackson*, *ante*, vol. 1, p. 376, and cases cited in the note, *ibid*.

In a foreclosure suit, the provisional assignee having been made a defendant, in consequence of the insolvency of one of the mortgagors, was declared entitled to his costs against the plaintiff, the latter to have them over against the fund.

Saturday, November 30th.

PRACTICE—SERVICE OF ORDER FOR HEARING.

CROSTHWAITE v. MURRAY.

On this cause being called on, it appeared from the affidavit of service that the order for hearing had been served on a servant at the registered lodgings of the defendant's attorney.

Service of the order for hearing.

Mr. Trench, the register, objected that the order was not properly served.

Mr. R. C. Walker for the plaintiff, contended that the service was good.

PENNEFATHER, B.

The rule is, that the order must be served either on the servant of the attorney, or upon the landlord or landlady of his registered lodgings, but service on the landlord's servant is not good service.

Cause struck out.

Thursday, December 5th.

PRACTICE—OPENING BIDDINGS—SALES—PURCHASER.

MAYNE v. MACARTNEY.

Biddings opened under the circumstances of the case, on an advance of £20 on £165, upon the application of a person who had bid at the former sale.

Whether the biddings will be opened or not is a question to be determined by the particular circumstances of each case.

MR. SMITH, Q. C., on behalf of James Macartney, who now offered to become a purchaser of the lands of Escragh, otherwise called Stone Park, &c., in the decree in this cause mentioned, which were sold on the 5th November last to Elizabeth Noble for a sum of £165, moved that the sale be opened, on the terms of the said James Macartney bidding for said lands the further sum of £20 over the last bidding, and forthwith to lodge such increased sum of £20 to the credit of the cause; and also to pay to the said Elizabeth Noble her costs (if any); and in case the said James Macartney shall be declared the purchaser, then to proceed to complete his purchase without delay.

It appeared that on the 5th of November, Mrs. Noble, by her brother, Mr. Hugh Collum, having bid the sum of £165, was declared the purchaser. Mr. John Collum, the attorney for the plaintiff in the cause, and brother of Mr. Hugh Collum, also attended the sale, and bid the sum of £160 on account of the said James Macartney. On the 13th of November, the purchaser's promissory note for the amount of the deposit was received by consent. On the 16th of November, the usual order to confirm the sale, unless cause in eight days, was entered; and on the 26th of the same month, the notice of this motion was served.

The last surviving life in the lease of Stone Park, the principal denomination of the lands sold, was that of the defendant, who was between seventy and eighty years of age; the interest in the remaining portion of the lands being also dependent on the life of another person nearly of the same age. An affidavit was made by Hugh Collum to oppose the motion, stating that he had bid for the premises on behalf of his sister Mrs. Noble, who resided in the townland immediately adjoining, and that she had been principally induced to bid for them for the purpose of preventing the annoyance to which her residence and farm had been subjected from the occupying tenants of the lands in question. It was further stated, that the price at which she became the purchaser was the full value of the premises, if not beyond it. The affidavit charged, that the object of Macartney in attempting to open the sale was for the purpose of annoyance, and not for the purpose of benefiting the estate or the parties in the cause.

The affidavit of Mr. Macartney stated that he had employed and instructed Mr. John Collum to act as his attorney to bid for and purchase the lands; and that had he not relied on that gentleman doing so, he

would either have attended the sale in person, or employed another attorney to bid for him; that Mr. Collum undertook to bid for the lands, and never intimated to the deponent that his sister Mrs. Noble intended to bid for them. The affidavit further stated that Hugh Collum, who lived near deponent in the town of Enniskillen, without apprising the deponent of his intention to do so, went to Dublin, attended the sale, and bid for the lands in the name of his sister; that John Collum being the only bidder against him, Mrs. Noble was accordingly declared the purchaser. The affidavit further charged that the fund was likely to be a deficient one, and averred that the present application was made by the deponent with the *bona fide* intention of becoming a purchaser, and not for the purpose of annoyance, as alleged by the affidavit of the said Hugh Collum.

An affidavit was made in reply by Mr. John Collum, repelling the insinuations contained in Mr. Macartney's affidavit. He stated that Macartney, who was aware that the deponent was concerned for the plaintiffs in the cause, spoke to him in Enniskillen on the 30th of October last, on the subject of the sale then advertised to take place; that deponent left Enniskillen for Dublin on that evening, having desired Macartney to furnish him with an authority in writing to bid for him, and to mention the sum he would give for the lands, which Macartney promised to do; that on the morning of the 5th November, deponent received a letter from Macartney, stating, that on consideration, he thought £150 or £160 would be a high price for the lands (and which, in deponent's opinion, was beyond their value). That deponent attended the sale, and bid the sum of £160 on Macartney's account. Mr. Collum denied, in the most positive terms, all knowledge of the intention of his sister Mrs. Noble, or of his brother Hugh, to bid for the lands until about two hours before the sale took place, when he was informed thereof by his brother; and stated, that had there been sufficient time, he would have communicated the fact to Mr. Macartney. It was further stated, that the sale on the 5th November was the fourth time on which the lands of Stone Park had been set up to be sold, the sales on the former occasion having been frustrated by various circumstances detailed in the affidavit. The deponent stated his belief that there would be a very small deficiency (if any) in the fund, provided no expense were incurred in making out title; but declared his apprehension of the difficulty, if not the impracticability of making out a clear title, if the estate were purchased by a person desirous of objecting to it.

Mr. James Sheil, for Mrs. Noble.—The first objection is, that the person who seeks to open the sale was present at the former sale by his attorney, and bid for the lands. Mrs. Noble is now entitled to make absolute the order of the 16th November, and undertakes forthwith

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to complete her purchase and lodge the amount of her purchase-money. She is also willing, from the advanced age of the lives in the leases, to accept of the title, without investigating it, or putting the estate to the expense of furnishing searches. This the present applicant has not offered to do. In the next place, the sum offered in advance is not sufficient, as it is a general rule that in all cases where the biddings for a property are small, the Court will not allow the purchase to be opened, unless there be an undertaking to pay £40 over the sum for which the property was purchased; *Nicholson v. Falkner* (a). That case also shews, that in the event of the Court opening the sale, the purchaser would be entitled to the costs of appearing on the motion.

Mr. *Peebles*, for the plaintiff, cited the case of *Farlow v. Waldon* (b), as laying down the rule that biddings will not be opened, unless an advance be offered of £40.

Mr. *John Brooke*, Q. C., for Mr. John Collum.

PENNEFATHER, B.*

Each case must be governed by its own circumstances (c). If the arrear of interest due upon the incumbrances affecting the property be very considerable, it may happen that any increase in the biddings will be insufficient to countervail the accumulation of interest occasioned by the delay. The circumstances of the present case are very peculiar, and I do not see how Mrs. Noble can have much interest in opposing the present application. The principal objection to it, however, is, that the very old lives upon which the interest in the property depends, may drop before the sale can be completed. Will Mr. *Smith's* client, therefore, consent to take the title as it stands, and complete the purchase, notwithstanding that the lives may in the mean time happen to drop?

The required consent having been given,

Baron PENNEFATHER said, that without laying down any general rule upon the subject, he would, under the circumstances of this case, grant the motion upon terms. His Lordship at first expressed some doubt as to giving the purchaser the costs of appearing upon the motion, but subsequently made the following order:—

* *Solus.*

(a) 1 Law Rec. 2 ser. 69.

(b) 4 Mad. 460.

(c) See acc. *O'Connor v. Richards*, *Sausse & Sc.* 246; *Biggs v. Rowe*, *Id.* 153; *Ford v. Head*, 1 Hog. 93, and cases collected in the note, *Sausse & Sc.* 156-7.

The said James Macartney undertaking to bid the sum of £20 over and above the sum of £165 already bid for the said lands, and to deposit the said sum of £20 in the Bank of Ireland to the credit of this cause within ten days, and to pay the said Elizabeth Noble the costs of her bidding; and also undertaking to take the title as it stands, and without investigation; and also undertaking to make such bidding, and complete his purchase, notwithstanding that the lives in the leases of said lands, or any of them, may die before a new sale, or the completion of the purchase;—let the Accountant-General be at liberty to receive the said sum of £20: and upon such lodgment being made, let the former sale be set aside, and the lands again set up to be sold; and let the Chief or Second Remembrancer tax the costs of said Elizabeth Noble; and let the said J. Macartney forthwith pay the same pursuant to his undertaking; and if said J. Macartney shall be declared the purchaser on the new sale, let him have credit for said sum of £20; and let the said J. Macartney pay the plaintiff and said Elizabeth Noble the costs of this motion, such costs to be taxed as one bill of costs; and also pay said John Collum the costs of this motion. And in case the said James Macartney shall not deposit the said sum of £20 within the time aforesaid, this motion to stand refused with costs, to be paid to the plaintiff and the said E. Noble, such costs to be taxed as separate costs, as also the costs of the said John Collum.*

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* The sale to Mrs. Noble was subsequently confirmed, the terms of this order not having been complied with.

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tors in said will named, at the extent aforesaid, to be held by them as their freehold, until the debt and damages in said writ mentioned should be fully levied.

That afterwards, as of Easter Term 1828, the said executors brought an ejectment on the title in the Court of Exchequer against the said Charles Cambie, founded on the said *elegit* and return, to recover the possession of said lands of Brookfield as a moiety of the aforesaid three denominations of land; to which ejectment the said Charles Cambie took defence, and same was tried at Clonmel, at the Summer Assizes of 1828, when a verdict was had for said executors (the lessors of the plaintiff in the ejectment), subject to a bill of exceptions taken on the part of said defendant; and upon which bill of exceptions judgment was afterwards given by the said Court in favor of said lessors of the plaintiff.

That on said trial the said Charles, the defendant, in said ejectment cause, relied on a prior judgment obtained in the Court of Exchequer by one Anne Carroll against his grandfather, the said Solomon Cambie, in Hilary Term 1785, for the sum of £630, and which had then become vested in Alexander Disney, who had recently revived the same and issued an *elegit* thereon, and obtained a finding that said Solomon was seized, at the time of the rendition of said judgment, of the town and lands of Castletown, Brookfield, Kilgarvin, Clonmackilliduffe, Coo-bawn, and Ballyscanlan, in the county of Tipperary, and that said lands of Brookfield, Kilgarvin, and Ballyscanlan were a true and equal moiety of all the said lands and tenements.

That said judgment in ejectment, so obtained by said executors, was afterwards duly enrolled in Hilary Term 1829, in the Court of Exchequer; and that the said Alexander Disney about the same time brought an ejectment, founded on said *elegit* and return so obtained by him, to recover possession of said denominations of land, and caused same to be served on plaintiff as one of the said executors, whereupon plaintiff was advised, that by reason of said proceedings of the said A. Disney, and the priority of the said judgment of Hilary Term 1785, the executors of the said George Ryan, deceased, could not legally enforce payment of the rents of Brookfield from the tenants thereof, inasmuch as said rents were applicable to the payment of said prior demand, and therefore no *habere* was issued at the suit of said executors on the judgment so obtained by them in the said ejectment cause.

That soon after the enrolment of said judgment by said executors, the costs of the ejectment so brought by them were levied by execution against the said Charles Cambie, and were paid by him.

The bill further charged that Alexander Disney accordingly entered into possession of the rents of Brookfield, and also of the lands of Kilgarvin and Ballyscanlan, and took and received the rents and profits thereof for several years in payment of his said demand, whereby he had

been or might, without wilful neglect and default, have been fully paid and satisfied the entire sums due to him for principal, interest, and costs; but that he alleged he was entitled to continue in receipt of the rents of said lands for payment of some other demand.

That plaintiff was then the only surviving executor of the said George Ryan, deceased, and that as such surviving executor and sole personal representative of the said George Ryan, deceased, he was entitled to the amount of the principal, interest, and costs then due, under and by virtue of the *elegit* which was issued on the judgment for £1027. 2s., obtained by the said George Ryan against the said Solomon Cambie in Hilary Term 1789, and that the amount so due to plaintiff on foot of said judgment, and the said *elegit* issued thereon, exceeded the said sum of £1027. 2s., being the penalty in the bond on which said judgment was obtained.

That the said Solomon Cambie, the consor of said judgment, was, at the time of the rendition thereof, and at the time of his death, seized of certain denominations of land, viz., Kilgarvin, Castletown, Brookfield, and Ballyscanlan. That at the time of his decease he was also seized and possessed of several other freehold and leasehold lands, and of considerable personal estate; and that by his will, bearing date as therein before mentioned, &c.—[By his will, his debts were to be paid out of his personal estate; Brookfield and other lands were devised to David Cambie, his eldest son; the lands of Ballyscanlan and Kilgarvin he devised to his second son, Edward, for life, with remainder to his first and other sons in tail male, &c. By a codicil to his will, he directed that David should pay his debts out of the property devised to him, to the extent of £1500, in case the personal estate should prove insufficient.]

The bill, after again averring that the will and codicil were proved by the testator's eldest son, David Cambie, proceeded, amongst other matters, to state—

That the said David Cambie departed this life in the month of March 1813, intestate, leaving Margaret Cambie his widow, and one son, the said Charles Cambie, who, on the death of his father David, entered and had since continued in possession of the said lands of Castletown, Brookfield, and two other denominations derived by the said David, under his father's will; and received, or claimed to be entitled to, the rents and profits thereof, subject to an annuity of £300, which his mother, the said Margaret Cambie, claimed to be entitled to thereout under her marriage settlement bearing date the 16th of November 1796, as and for her jointure for the term of her life.

That the said Edward Cambie, the second son of the said Solomon Cambie (the consor of the judgment of Hilary Term 1789), departed this life on or about the 27th of February 1836, intestate, leaving the defendant Solomon Cambie his eldest son, who is now seized and possessed of the said lands of Kilgarvin, and Ballyscanlan, with

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remainder, as to the said lands of Kilgarvin to Edward, his eldest son and his heirs male.

That the said Solomon Cambie, the defendant, intermarried with Mary Stack, spinster, and that it was alleged that previous to his marriage with her, a certain deed of settlement, bearing date on or about the 19th day of November 1835, was made between the said Solomon Cambie of the first part, the said Mary Stack (now Mary Cambie) of the second part, and Charles Maurice Stack, then of, &c. (but who had since departed this life), and R. J. T. Orpen, of, &c., of the third part; whereby the said lands of Kilgarvin were conveyed, as it was alleged, to the said C. M. Stack and R. J. T. Orpen upon certain trusts, the nature of which the parties to the said deed refused to disclose, but under which the said R. J. T. Orpen, as the surviving trustee named in said deed, claimed to be entitled to some estate or interest in the said lands of Kilgarvin.

"That the said Elizabeth, widow of said Solomon, the conusor of said judgment of 1789, is also long since dead, intestate; and though plaintiff has made inquiry, he cannot now set forth the name of the person who plaintiff is informed administered to said Solomon with his will annexed, since the death of said executors; and plaintiff has applied to the several confederates herein named, for the discovery of the name of such administrator, but which, though well known to them, they refuse to discover."

The bill then charged, that a large sum of money was due and owing to the plaintiff as surviving executor of the said George Ryan, deceased, for principal and interest under the *degit* issued on the judgment of Hilary Term 1789; and that the personal estate of Solomon Cambie, the conusor of said judgment, had been long since distributed, and that plaintiff was entitled to have the sum so due to him raised by a sale of a competent part of the lands of which said Solomon was so seized, or of the said lands so particularly charged with payment of his debts by the codicil made by him to his will, as therein before mentioned.

The interrogating portion of the bill contained the following inquiries in reference to the assets and personal representative of Solomon Cambie, the conusor of the judgment of 1789—"Did the said Solomon leave any and what personal estate: who possessed themselves of the same, and how has the same been applied?—Let them (the defendants) set forth the name of the person who has obtained administration to the said Solomon since the death of his said executors."

Prayer—for an account of the sum due to the plaintiff on foot of the judgment of 1789, for principal, interest and costs; and for an account, if necessary, of the personal estates of Solomon and David Cambie, respectively. The bill also prayed an account of the real and freehold estates of the same persons; an account of prior incumbrances; a sale of a competent part of the lands and premises for payment of the plaintiff's demands; and for a receiver.

To this bill the defendants, Solomon Cambie and wife, R. J. T. Orpen, surviving trustee in the settlement executed on their marriage, and Edward Cambie, a minor, son of the said Solomon Cambie and wife, demurred: first, for want of equity; secondly, because the personal representative of Solomon Cambie, the conusor, was not a party.

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The case was argued before Baron RICHARDS in last Trinity Term.

Mr. *Napier*, with whom was Mr. *Warren*, Q. C., for the demurrer.

Mr. Serjeant *Greene*, Mr. *Smith*, Q. C., and Mr. *Geraghty*, sen., in support of the bill.

Saturday, January 25th.

[It has not been thought necessary to report the arguments; such of them as were most material being fully stated and discussed in the following judgment, which was on this day delivered by Baron RICHARDS:]

His Lordship, after stating the pleadings, proceeded thus:—

There are three questions raised upon this demurrer—

First. It is contended that the revival of a judgment on a writ of *scire facias* is not sufficient to enable a party to proceed at law or in equity, for recovery of the sum secured thereby, if a period of twenty years shall have elapsed from the rendition of the original judgment; in other words, that by no possibility can a judgment be kept alive by revival, or by a series of revivals, for more than twenty years from the entry of such judgment originally; and the 40th section of the 3 & 4 W. 4, c. 27, is relied on for that purpose.

Secondly. It is insisted, that where a party has once issued his *elegit* after the death of the conusor, and obtained a finding thereunder, he cannot afterwards abandon such proceedings, and have recourse to any other remedy, though prevented from getting into possession, or making his proceedings by *elegit* effectual, by reason of the interference of a prior and paramount creditor.

It is also said, that in this particular case there was a sufficient reason, upon special grounds, why the plaintiff should have gone against other lands, and not against those which are claimed by the demurring parties.

Thirdly. It is insisted that the statement in the bill, in respect of the inability of the plaintiff to bring before the Court the personal representative of the conusor of the judgment, cannot be received as sufficient to protect the pleading from a demurrer for want of parties; which, in fact, is the special cause of demurrer assigned upon the record.*

* *Storey on Equity Pleading*, v. *Staveland*, 1 Ves. sen. 56, were p. 176, pl. 256, and *Lord Uxbridge* cited to sustain this ground of de-

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I shall consider these objections *seriatim*; and first, as to the construction of the statute 3 & 4 W. 4, c. 27.

The words in the 40th section are, that after the 31st of December 1833, "No action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same; unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

There is no such term as the word *first* introduced into that section; the words are not, "But within twenty years next after a present right to receive same shall have (*first*) accrued;" and yet, in the second section limiting the right to recover land, the words are, "But within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have *first* accrued."

Now, I do not see how it can be argued, that a party obtaining a judgment on *scire facias* has not, *by the judgment of the Court*, a then present right to "receive" the sum secured by the original judgment. True, his right to recover or receive the debt does not then for the first time accrue; but he then has, by the solemn judgment of the Court, a then present right to recover his demand, and to issue an execution for that purpose. Certainly, if you interpose the word "*first*" in the 40th section, and make it run "*first* accrued," it would make a material difference, and go far to sustain the argument used by counsel for the defendants; but why interpose that word (which the legislature has not thought proper to introduce into this section), in order to give a most inconvenient and injurious construction to the act, and a construction wholly inconsistent with other statutes on the same subject, and especially with the provisions contained in the somewhat recent act of the 9 G. 4, c. 35, which fully recognises the efficacy of a judgment of revival, according to the course and practice of the Court.

If it was the intention of the legislature that no judgment, notwith-

murrer; *Bowyer v. Corert*, 1 Vern. 180, and *Storey on Equity Pleading*, 95, *Wally v. Wally*, id. 484, *Mifflin*, p. 76, pl. 92, were relied on *contra*. *fard's Equity Pleading*, 4th ed. p.

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standing the previous law on the subject, and the provisions in the 9 G. 4, c. 35, could, by the means of a revival on *scire facias*, be kept alive so as to affect the estate of an adverse or fugitive party, who would neither pay nor give an acknowledgment in writing (such as required by the statute now under consideration), I feel bound to believe that the legislature would have taken a plain and direct mode of carrying out such an intention; we should have had a recital plainly and clearly worded, explaining that such was the object and intention of the act. The legislature, I cannot but believe, would not have made so important a change in the law as that contended for, by this species of forced exposition which, it is said, the 40th section of the act in question is to receive.

The injustice as against creditors that would necessarily follow from the construction contended for by the defendant, would be another argument, in a doubtful case, against holding that the legislature did intend, *inferentially*, to make so very important and extraordinary a change in the law. If the defendant's construction of the act be well founded, it must follow that the creditor, though he may use every exertion possible on his part, and *de anno in annum* from the rendition of his judgment, keep the same revived, yet, must he lose his demand. To effect this, all the debtor has to do is to cover his present property, if any he has, for a sufficient length of time, so as to prevent his creditors from obtaining any fruit thereout for twenty years, and he will thereby bar the remedy of his creditors effectually, and then become entitled to enjoy his property, or whatever estates may come to him at any time during his life, free from any claim or demand of his creditors. A debtor who may happen not to have any estate or property in possession, may still more easily effect this; and although such a party may, at the end of the twenty years, become entitled to £10,000 or £20,000 a-year, he never can be compelled to pay a shilling thereout to a creditor circumstanced as I have mentioned, if the defendant's construction be the true construction of this act.

Again, without any fraud of the debtor, there may be prior creditors in possession of his property, whose demands, it is easy to conceive, may not be paid for twenty years; and yet it must follow, according to the argument, that even under such circumstances, the creditor is to lose his debt, unless he has the good fortune to induce his debtor to give him an acknowledgment under the statute; and this in the face of the proviso in the 42d section of the act, that gives a creditor kept out of possession by paramount incumbrances interest on his debt during all the time he may be so kept out. I could, if necessary, multiply instances of injustice that such a construction would inevitably lead to, but I think it unnecessary so to do.

I shall only say, that it appears to me that judgments have been, for a very great length of time prior to the passing of the act in question,

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and were then a common security, both in England and Ireland, for vast sums of money lent and advanced, and for monies to become and grow due at future periods, and upon the happening sometimes of remote, and oftentimes of contingent events, and for the performance of covenants for payment of money and the like, and that the efficacy of such species of security has been over and over again recognised by Courts of Law and Equity—[See the judgment of Lord Guillelmore in the Irish case of *D'Arcy v. Chambers* (a)]—and also by a variety of acts of parliament; and such being the case, I must acknowledge that my opinion is, that nothing but the clearest language in a newly made act of parliament ought to warrant, or, at least, would lead me to adopt such a construction as that contended for by the defendant—a construction that would go far to defeat the purposes for which judgments have been hitherto resorted to, and considered so peculiarly efficacious in both countries.

The judgment of revival, I take it, is an *adjudication* by a Court of Law, that the party has then “a *present right*” to recover, and, therefore, to “receive” the sum due on foot of the judgment; and, in my opinion, the creditor is entitled to say, that it is from such adjudication or judgment of revival that time is to commence to be counted against him, under the 40th section of the statute, and so *toties quoties* upon every fresh judgment of revival.

The legislature, in my opinion, must be taken to have passed the act with the full knowledge of the course and practice of the Courts of Law touching the revival of judgments, and the nature of such securities, and the legal effect of judgments of revival; and reading the act of parliament in connexion with the acknowledged and established practice of the Courts of Law in respect to the revival of judgments by *scire facias*, I confess I feel no hesitation in rejecting the inferential construction of the statute contended for by the defendants.

A judgment on *scire facias*, though founded on the original judgment, yet brings down such first judgment to the date of the judgment on the writ of *scire facias*. The writ recites the original judgment, and requires the defendant to shew cause why the plaintiff should not have execution thereon, according to the form and effect of the recovery aforesaid. Is not that requiring the defendant to shew, if he can, that the plaintiff has not a then *present right* to receive the sum secured by his judgment?—and the defendant is at full liberty to shew cause, if any such he can, by plea or otherwise, why the plaintiff should not have execution: in other words, he may shew that the plaintiff has no then *present right* to receive or recover the sum secured by his judgment; but failing to do so, the Court *adjudges* (and it is the judgment of the Court I

(a) 1 Sob. & Lef. App. 474.

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go upon) that the plaintiff shall have execution upon his original judgment. I ask, is not that *adjudging* that the plaintiff has a then *present right* to recover and receive his debt? and as long as that judgment of revival stands, is it not, and ought it not to be conclusive on the subject? Would it not be most inconsistent in a Court of Law to say, although we on such a day adjudged you entitled to issue execution for your demand secured by this judgment, yet we must *now*, and notwithstanding that our former judgment of revival remains unreversed upon record, hold, that at the time we made such adjudication, and awarded such execution, you had not a then present right in the legal meaning of those terms, "to receive" the sum for the recovery of which we adjudged you entitled to execution? It would be impossible, in my opinion, that a Court of Law could act so inconsistently.

At common law, there could be no execution upon a judgment after a year and a day, and the writ of *scire facias* was given by statute to remedy that inconvenience; and I think it would be too much to hold that the words used in the 40th section of the recent act, 3 & 4 W. 4, c. 27, had the effect of impliedly repealing the statute of Westminster, 13 Ed. 1, st. 1, c. 45, or, at least, of annihilating in a great degree the efficacy of a judgment of revival on a writ of *scire facias* issued in pursuance of that act.

I can very well understand the legislature making a mere proceeding on a judgment, such as the filing a charge under a decree to account or order of reference of a Court of Equity, in which no decree or judgment of any kind is ever obtained (and which was the case of *Smith v. Creagh*, in Batty's Reports), or the like, insufficient of itself to keep a judgment alive as against a cosutor, or his estates, after twenty years; and, without presuming to question the soundness of the decision of the Court of Queen's Bench in *Smith v. Creagh*, and the exposition which the statute 8 G. 1, c. 4, s. 1 (*Inf.*), received upon that occasion, I may be allowed to observe, that nothing was more calculated to lead to inconvenient results than the latitude afforded by the construction which the 8 G. 1 so received, in respect to the keeping alive of old and stale judgments.

Whether the statute now under consideration, in the change which it has made in the law, has operated retrospectively, so as to render nugatory and of no avail such an act, as was held in *Smith v. Creagh* to keep a judgment alive, it is not, and most probably never will be necessary to consider, and therefore I give no opinion on the subject. But I am very sure, that no such act as that relied upon in *Smith v. Creagh*, if done after the 3 & 4 W. 4, c. 27, came into operation, could now be relied on, to take a case out of the 40th section of that statute. But, on the other hand, I am of opinion that a judgment of revival is abundantly sufficient for that purpose.

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It has been said in argument, that great incongruity and inconsistency would arise in a case where there was a mortgage with a judgment collateral, if the statute was to receive the construction contended for by the plaintiff. It is said, that in such a case, the demand of the creditor, so far as the same rested on his mortgage security, might be barred, at the same time that the collateral security by judgment would remain good and valid. I apprehend that several answers may be given to this argument; but it may, perhaps, be sufficient to observe, that a mortgage, being in its nature and origin a security *in rem*, if a mortgagee is barred by his remedy, it must be by his own wilful default, for he can at all times make his mortgage security available, if it be worth any thing; at all events, he can do so to save the bar of the statute, by proceeding as against the thing mortgaged. A mortgagee, therefore, who allows his security to become ineffectual as against the thing pledged to him for his demand, by lapse of time, does so voluntarily, and in no case necessarily, in my opinion. Not so in the case of a judgment creditor, as I think, I have already shewn.*

Then as to the second point argued by counsel for the demurrer.

The 13 *Ed.* 1, c. 18, gave the writ of *elegit*.

The 32d *H.* 8, c. 5 (*Eng.*) gave the *re-elegit*. But according to the construction put upon that statute, there could not be a *re-elegit* unless there was a total eviction, upon the principle that a party could not in law have two *valuable* executions. If a single acre or any part of the lands seized, were allowed to remain with the creditor, the execution was accounted a valuable execution, and there could be no new *elegit*; *Co. Litt.* 289 b; *Fulwood's Case* (a); *Blumfield's case* (b); *Crowley v. Lidgate* (c).

This was the law of England; now in Ireland from the passing of the 26 *G.* 3, c. 31, s. 2, the law was different. The statute in Ireland that gave the *re-elegit* was the 10 *C.* 1, c. 7, which followed the English act, 32 *H.* 8, c. 5; but the 26 *G.* 3, c. 31, s. 2, reciting the

(a) 4 *Rep.* 66, a.

(b) 5 *Rep.* 87.

(c) *Cro. J.* 338.

* The decision of the learned Baron on the first question has been since affirmed by the decision of the majority of the Judges in the case of *Ottiswell v. Farran*, in the Court of Exchequer Chamber.

In that case, it was held (Baron FOSTER differing in opinion from the other Judges), that the period

of limitation prescribed by the 3 & 4 *W.* 4, c. 27, s. 40, begins to run against a judgment from the date of the last revival, and not from the entry of the original judgment. See the case reported, 2 *Ir. Law Rep.*

It is to be observed, that an appeal from that decision is now pending before the House of Lords.

construction given to the former act where the whole of the lands seized had not been evicted, enacts, that the said act (10 Car. 1, c. 7), shall be construed to extend to all cases where any of the lands, tenements, or hereditaments so taken in execution, or any part of the estate or interest of the conusee therein, shall be evicted.

In this case the plaintiff never was for an hour in possession under the *elegit*; on the contrary, he was prevented from going into possession by the proceedings of a prior creditor, and it can scarcely be said that so long as that prior creditor continued in possession and was in fact unpaid his debt, that the plaintiff was barred of any other remedy for recovery of his demand, and bound by the ineffectual one which he had attempted to take in 1828. If this be so, it is difficult to understand upon what legal principle the plaintiff should be now prevented from resorting to another remedy for recovery of his judgment; I mean, if he might have done so at any intervening period of time between 1828 and 1839, it is difficult to understand why he should be prevented from doing so now. I am not now to be understood as expressing any opinion as to what might be the effect of a proceeding by *elegit*, inquisition and finding thereunder, and possession taken in pursuance thereof, and no disturbance given to the creditor; or whether such a proceeding taken after the death of the conusor, ought, or ought not to bar the creditor from resorting to any other remedy in a Court of Equity for recovery of his demand?

No doubt, Sir Anthony Harte has expressed his opinion that a judgment creditor who proceeds by *elegit* in the lifetime of his debtor, may after the death of the conusor file a bill in equity for the payment of his debt out of his personal and real assets, but there a new and different right accrues after the *elegit* by the death of the party,—a right to have the real and personal estates of the conusor administered by a Court of Equity; I take it however to be quite another question whether a judgment creditor, who chooses to proceed by *elegit* after the death of the conusor, and gets into possession of a moiety of his debtor's freehold property and is not disturbed in that possession;—it is, I conceive, a very different thing whether such a creditor has a right capriciously to abandon his *elegit* proceedings and file his bill in equity for a sale of his debtor's freehold estates for satisfaction of his demand; I shall only say that I am not aware that it has ever been decided that a creditor so acting, and so circumstanced, has such an equity:—the present case however, is not that case as I have already shewn, nor does it, for the reasons that I have stated, fall within the principle that would be applicable to such a case. The plaintiff therefore never having taken possession under his *elegit*, and having been prevented for a number of years from so doing, I am clearly of opinion that the circumstance of his having issued such *elegit* (though he did so after the death of the conusor), ought not to bar his right to the ordinary relief administered by a Court

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of Equity at the instance of a judgment creditor who files his bill for payment of his demand out of the real and personal assets of his debtor.

It has been said by counsel in argument, that the revival in 1828 must be considered a revival against the heir, and such only of the terretenants as were served, but not against any other party interested in the lands,—the Irish statute dispensing with the necessity of serving all the terretenants, and thereby authorising in a manner a partial revival; but on looking to the bill I find that the terretenants of the lands, in right of which lands the demurring parties have been brought before the Court, were duly served with the *scire facias*, on which the revival of 1828 was founded. Then again, it is said that with respect to one denomination of those lands, viz., Kilgarvin, the defendant Solomon Cambie, one of the parties demurring, was at the time entitled as tenant in tail in remainder, under the will of the conusor, expectant on the death of his father Edward Cambie, and that he was not served. In answer to this, it might be sufficient to say, that the several demurring parties are also brought before the Court, in respect of another denomination (Ballyscanlan), as well as Kilgarvin, and I would collect from the bill that Ballyscanlan was not subject to any entail, but taken by the defendant Solomon, as the heir of his father Charles Cambie. But I feel no difficulty in holding that if the revival be good against the terretenants, it is good also against all persons not terretenants or in possession, who may have remote, or contingent interests in the lands; I never can accede to the argument that it is necessary to seek out all the limitations to which an estate may be subject, and to serve all persons interested therein, in order to have an effectual revival of a judgment. The creditor only seeks to deal with the possession, and he is not expected to look beyond the heir and the terretenants or parties in possession of the lands of the conusor.

The proceedings by ejectment adopted by the creditor have also, in my opinion, been by far too strongly relied upon by the counsel for the defendants.

It is manifest upon the bill, that the plaintiff sought fairly and *bona fide* to make the most of his proceeding by *elegit*, but failed in being able to make such proceeding effectual.

I cannot therefore hold, under these circumstances, that the plaintiff was bound to limit his relief, or the relief which he prayed by his bill, to the lands comprised in the sheriff's return to his *elegit* of 1828. If he is entitled to come into equity for a sale, as in my opinion he is, it would be most imprudent if not impracticable, regard being had to the accounts to be directed and relief to be granted in such a cause, to seek relief in the contracted way contended for by the defendants. Possibly, at the hearing there may be some cross equities between the defendants, which the parties to this demurrer may avail themselves of, but it would be too much to say (ruling the other points as I do), that the plaintiff

has no equity against these defendants for all or any of the reasons assigned at the bar. I therefore, upon the whole, rule the second point raised also against the defendant.

The third objection is for want of parties ; and upon this objection I have felt a good deal of difficulty. My own impression at first was, that the bill was defective in this respect. I did not think that a sufficient excuse had been alleged for omitting to name on the record the personal representative of the conusor ; but upon further consideration, I am disposed to hold, that sufficient does appear upon the bill, according to the doctrine laid down by Lord Redesdale in his treatise, and in the cases to which he refers, to protect the bill from a demurrer for want of parties.

The bill states—[His Lordship here read the passages marked with inverted commas from the bill.]—Now Lord Redesdale, in page 180, lays it down thus :—“ Whenever a want of parties appears on the face of a bill, the want of proper parties is a cause of demurrer. But if a sufficient reason for not bringing a necessary party before the Court is suggested by the bill ; as if a personal representative is a necessary party, and the representation is charged to be in litigation in the Ecclesiastical Court ; or if the bill seeks a discovery of the parties interested in the matter in question, for the purpose of making them parties, and charging that they are unknown to the plaintiff, a demurrer, for want of the necessary parties, will not hold.”

And he refers for this position to the case of *Bowyer v. Calvert* (a) ; in which a demurrer had been taken, because a co-executor, a confessedly necessary party, had not been made a defendant, but the plaintiff having charged in his bill that he knew not who such executor was, and prayed that the defendants might discover who he was, and where he lived, the Court overruled the demurrer. This is a case directly in point ; for I think the allegation in that case as to the want of knowledge of the party is not stronger than in the present case ; and the adoption of that case by Lord Redesdale in the last edition of his work, which it is well known was not published without his authority, gives it a weight and importance that it otherwise might not, from the brief nature and character of the report, appear entitled to. Upon the whole (however this objection for want of parties might have fared if taken by plea, and the causes alleged in the bill for not naming such party traversed on the record), I think upon the text of Lord Redesdale and the authority to which he refers, that upon a demurrer to a bill framed as the present, I should disallow such an objection. I, therefore,

Overrule the demurrer, with costs.

Upon the application of Mr. *Napier*, the defendants obtained time until the first day of the next Term, to answer on the terms of rejoining, and appearing on the hearing *gratis*.

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NOTICE—ATTORNEY AND CLIENT—AGENT—PRIORITY—
REGISTERED DEED—LIEN—CONSENT—MORTGAGE—
BOND—ASSETS.

Executors of *LENEHAN v. M'CABE* and others.

In a foreclosure suit B. F. claimed under a mortgage of the equity of redemption, executed by the defendants in February 1839, and duly registered on the 7th of that month. The mortgage was obtained for the purpose of securing a debt due to B. F. from the mortgagors, and which had been previously secured in 1825 by the bond of D. who then held the mortgaged premises in trust for the mortgagors.

THIS was an application on behalf of Bridget Fry, a third person, to have the special point reserved in the Second Remembrancer's report ruled in her favor.

That report was dated the 28th of January 1840, and purported to be made in pursuance of an order in this cause of the 9th February 1839, by which it was ordered that the consent therein mentioned should be made an order of the Court as between the parties who signed the same; and accordingly, that in consideration of the forbearance of James Nugent, John Reid, Mary Kelly and Edward Armstrong, they should be at liberty to file charges for their respective claims, with the costs incurred by them respectively, in certain actions brought by them against Jane Mary Kyan, one of the defendants, when taxed under the decree to account to be pronounced in this cause, and should be paid the amount of their respective demands when proved, together with the costs of proving same, out of the produce to be realised by a sale of the mortgaged premises in the pleadings mentioned, after payment of such prior incumbrances as should be reported due, and of the principal and

Upon the death of D. the premises (which were chattel) were assigned to the *cestui que trusts* by his personal representatives. The priority of B. F. under her mortgage was disputed by certain simple contract creditors of the mortgagors, who having brought actions at law, had agreed that the proceedings in such actions should cease upon the terms contained in a consent, bearing date the 19th January 1839, and which was made a rule of Court on the 2d of February following—namely, that they should be paid their respective demands, when proved, together with costs, out of the produce to be realised by a sale of the mortgaged premises after payment of prior incumbrances. It appeared that the attorney acting for B. F. in procuring the execution of the mortgage to her, not only knew of the rights and had notice of the proceedings of the other creditors, but was in fact an active agent for the defendants (the mortgagors), in effectuating the arrangement whereby the other creditors had been induced to relinquish their proceedings at law upon the terms contained in the consent. *Held*, that such notice to B. F.'s attorney was sufficient to prevent her (although unaffected by *personal* notice) from gaining a priority by force of the registry of her mortgage deed over the other creditors who had acquired a prior equitable lien on the land by virtue of the consent. *Held* also, under the circumstances, that B. F. had no equitable right or claim (as against the consent-creditors) to the mortgaged premises in respect of their having been the assets of D., the obligor in the bond of 1825. *Seemle*, that under no circumstances, would B. F. have had such an equity, as it was competent for the representatives of D. upon his death to assign over to the *cestui que trusts* the trust premises, without their being in the first instance subject to the debt due to B. F.

Notice to an attorney or agent is not to be considered as implied or constructive notice merely, which is properly referable to something that a party or his agent ought, if reasonable diligence had been used on his behalf, to have acquired a knowledge of, but which possibly neither he nor his agent ever did know or acquire any knowledge of.

The general proposition that notice to an agent so as to affect his principal, must be in the same transaction, admits of certain qualifications.

interest of the mortgage debt in the pleadings mentioned, and of the costs and expenses of the several parties, plaintiffs and defendants in this cause, without prejudice to the rights of any other parties :—and also in pursuance of a consent order of the 10th of May 1839, whereby it was ordered that Bridget Fry, therein mentioned, should be at liberty to file a charge for her claim under the decree to account, and that she should be paid the amount of her said claim under said decree according to her priority, out of the surplus of the produce to be realised by a sale in this cause, or otherwise, of the said mortgaged premises after payment of such prior incumbrances, if any, as should be reported due, and of the principal and interest of the mortgage debt in the pleadings mentioned, and of the costs and expenses of the several parties in the cause.

The report found that John Dunne was in the year 1824 possessed of the premises in the pleadings mentioned, as assignee of a lease thereof for a term of years, and that he held the same as a trustee for a certain religious community of ladies then inhabiting the same, of which the said J. M. Kyan and Catherine Cunningham were sisters; that the said John Dunne being so possessed of or entitled unto said premises as such trustee, in consideration of the sum of £1000, paid to him as such trustee by the said Bridget Fry, with the consent and approbation of the said community and for their benefit, did by his bond bearing date the — day of January 1825, become bound to the said Bridget Fry, her executors, administrators and assigns, in the sum of £1000; and that the said sum of £1000, or a considerable part thereof, was expended in buildings and improvements upon the premises. The report then stated, that Dunne being further indebted as such trustee for the said community to Denis Lenehan, the testator in the pleadings mentioned, for certain buildings which Lenehan had erected on the said premises, he, the said Dunne, executed to Lenehan the mortgage of the said premises, to foreclose which the bill in this cause was filed; that Dunne died in 1827, having previously made his will, and thereby appointed the Rev. J. Murphy and Henry Hughes his executors, who proved his will, and thereby became legally entitled to these premises as trustees for the said community; that they, upon the 4th day of October 1832, assigned the premises to the said Rev. John Francis M'Cabe and Jane Mary Kyan, two of the defendants, to hold the same as trustees for the said community, and that they had since held them as such trustees; that the condition of the said bond became forfeited on or about the 5th day of January 1830; and that the sum of £1000, thereby secured, with interest thereon, from the said 5th day of January 1830, remained due to the said Bridget Fry.

The report further found, that the said J. M. Kyan and Catherine Cunningham, two of the defendants, were in February 1839, and still were, the sole surviving members of the said religious community; and

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that a deed, bearing date the 2d of that month, was entered into between the said J. F. M'Cabe and J. M. Kyan of the first part; the said J. M. Kyan and Catherine Cunningham of the second part; and the said Bridget Fry of the third part; whereby, after reciting the possession of the premises by Dunne, the execution and forfeiture of the bond, and that the said J. M. Kyan and C. Cunningham were the sole surviving members of the said community, and alone beneficially interested in the said premises, and that being desirous to secure to Bridget Fry the repayment of the said sum of £1000, with interest, they had agreed to charge said premises with payment thereof; it was by said deed witnessed that in pursuance of said agreement, &c., the said J. F. M'Cabe, and J. M. Kyan, and also the said C. Cunningham, did for themselves, their and each of their executors, administrators and assigns, according to their respective estates and interests, charge and incumber the said premises with the payment of the said principal sum of £1000, so secured by said bond, and interest thereon from the 5th day of January 1830, being the day on which the condition of said bond so became forfeited. The report then found, that the said deed was executed by J. M. Kyan on the 2d February 1839, by Catherine Cunningham on the 5th, by J. F. M'Cabe on the 6th, and by Bridget Fry on the 7th of the same month; on which last mentioned day the deed was registered: and that previous to the execution of the said deed by any of the parties, J. J. Brady, acting as attorney for the said Bridget Fry, had notice of the proceedings of the said J. Reid, J. Nugent, M. Kelly and E. Armstrong.

The report further found, that the said religious community were, on and previous to the 19th day of January 1839, indebted to the last mentioned persons for goods sold and delivered by them respectively to and for the use of the said community; and that those persons having applied to the defendants J. M. Kyan and J. F. M'Cabe for payment of their respective demands, their attorney, M. Armstrong, was on the 1st of October 1838, referred by M'Cabe to Mr. Laffan, who was the attorney for the defendants M'Cabe and Kyan, or to Mr. J. J. Brady in the absence of Laffan, on the subject of the said demands; which J. J. Brady afterwards became the attorney of the said Bridget Fry, and acted for her in preparing the deed of the 2d February 1839, and procuring the same to be executed. That on the 6th of October 1838, Armstrong furnished the said Brady with a draft consent entitled in this cause, and purporting to be made between the said defendants M'Cabe, Kyan, and the said several creditors.—[The consent was in terms nearly similar to that subsequently entered into].—That on the 25th of the same month Armstrong furnished Brady with a schedule of the debts claimed by the said creditors, and on the 1st of November following, received a note from Brady stating, that although his clients were advised not to accede to

those persons coming in as creditors, and proving their demands in the cause, Mr. M'Cabe and Mrs. Kyan were quite willing to give his (Mr. A.'s) clients any undertaking he or counsel might agree upon that his clients should have the first lien on any funds that might remain after payment of all demands and costs in the cause. That upon the receipt of this letter the compromise was broken off, and the creditors commenced actions at law against the said J. M. Kyan, to which she appeared and pleaded by her attorney, Mr. Laffan. That on the 16th of January 1839, Mr. Brady furnished to a Mr. Sheridan a draft consent entitled in this cause, and purporting to be between the defendants, J. F. M'Cabe, J. M. Kyan, C. Cunningham, and the said creditors; and wrote with the draft consent to Sheridan, stating that he sent a consent by signing which he thought Mr. Armstrong's actions might be put an end to, and requesting Sheridan to see Armstrong on this subject early the next day, and if he approved of this consent to stop him from serving notices of trial. That on the same day, Armstrong received a note from Brady, stating he had at request of Laffan sent to Mr. Sheridan the said consent, and requesting that Armstrong would see Sheridan that evening, expressing a hope that if the consent were satisfactory, Armstrong would not serve notice of trial, or incur further costs in the actions brought by his clients against the said J. M. Kyan.

The report further found, that the said Armstrong did wait on Sheridan on the 17th January 1839, and that Sheridan approved of the draft consent, and obtained from Catherine Cunningham a letter of authority, required by a memorandum of Brady, at foot of the said draft, and that in pursuance thereof, an appearance in this cause was entered for said C. Cunningham by Brady, as her attorney. That afterwards, on the said 17th day of January, Armstrong served notice of trial in the said several actions, for the purpose, as stated by him, of enabling him to go to trial in case the proposed arrangements were not completed. That the said draft consent having been altered in some respects by Mr. Armstrong, same so altered was signed by C. Cunningham, J. M. Kyan and J. F. M'Cabe (the defendants in this cause), previous to the 2d of February 1839; by the attorney for the plaintiffs on the 8th of February 1839; and that upon the 9th of the same month it was made an order of this Court. The report then found, that there were due to the said four creditors, on foot of their demands for goods sold to the defendants, J. M. Kyan, and C. Cunningham, and for the costs of their proceedings at law, certain sums amounting in the whole to £512. 7s. 11d., and to Mrs. Fry a sum of £1476. 18s. 5d.

The Officer concluded his report by stating, that upon the foregoing facts it was contended before him, on behalf of the said B. Fry, that she was entitled to priority in relation to the sum so due to her over the said James Nugent, John Reid, Mary Kelly, and Edward Armstrong, in

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relation to their several and respective demands; while, upon the other hand, it was contended on behalf of these creditors, that they were entitled to priority over the said B. Fry, in relation to her demand; and which said question of priority, or whether there was any priority between them, the Officer submitted to the consideration of the Court.

It appeared that the decree for a sale was not pronounced until June 1839.

Mr. Francis Brady, for *Mrs. Fry*.—The equities to be administered in this case are between a creditor, whose debt is secured by bond dated so far back as the year 1825, and that debt subsequently ratified by the mortgage of the year 1839 (the consideration of these securities and the subsistence of the debt not being disputed), and certain simple contract creditors of the defendants. The agreement between the defendants and the simple contract creditors was not in the nature of a charge upon real estate; it was merely that they should be paid out of the fund to be realised by the sale of the mortgaged premises under the decree in this cause. It was a charge, at best, upon a fund in the custody of the Court, and the lien upon it could not attach until the 9th of February 1839, the day upon which they obtained their order making the consent a rule of Court; whereas *Mrs. Fry* was, upon the 7th of the same month, the absolute owner of the equity of redemption in these premises, under a deed of conveyance registered upon that day. The counsel for the creditors endeavoured in the office to displace the priority thus acquired, by saying that the property which was the subject of the dealings between *Mrs. Fry*, these creditors, and the defendants, was property in the hands of the Court; and although their lien was subsequent in date to *Mrs. Fry's*, yet that they acquired priority by giving to the Court, as the trustee of the fund, prior notice of their lien, by making their consent a rule of Court first; and for that position they cited the cases of *Deville v. Hall* (a); *Loveridge v. Cooper* (b); *Foster v. Blackstone* (c). But without disputing the authority of these cases, it is sufficient to say they have no application to the present, in which the subject-matter of *Mrs. Fry's* dealing with the defendants was real estate. Those were cases of *choses* in action, and although it was attempted on some occasions to extend the doctrine of those cases to real estate, it was invariably unsuccessful. The question was set at rest by the latest case on the subject, *Jones v. Jones* (d), in which all these cases are reviewed.—[RICHARDS,* B. They must shew that you had notice of the consent entered into with the creditors to take your case out of the Registry Act.]—There has not been any evidence, and there

(a) 3 Russ. 1.

(c) 1 Myl. & K. 297.

(b) 3 Russ. 30.

(d) 8 Sim. 633.

* *Solus*.

is no finding in the report that Mrs. Fry had any notice of the proceedings with the creditors. We have always admitted that her attorney had such notice. Even if the deed were out of the case, we contend that we have a right to resort to her bond, and follow these premises as assets of Dunne, the obligor, in the hands of the defendants, and make them available for the payment of her demand, in priority to these creditors.

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Mr. *Smith*, Q. C., and Mr. *Henry Hughes*, for Nugent, Reid, Kelly, and Armstrong.—Considering the part which Mrs. Fry's attorney acted in the transactions between the defendants and the other creditors previous to the execution of the deed of February 1839, and the express finding that *previous* to the execution of the said deed by any of the parties thereto, Mr. Brady, acting as attorney for Mrs. Fry, had notice of the proceedings of these creditors, it is clear that lady must be affected by such notice to her agent. The case of *Hargreaves v. Rothwell* (a) is precisely in point; and in that case, it was decided that where one transaction was closely followed by and connected with another, or where it is clear that the previous transaction was present to the mind of a solicitor when engaged in another transaction, notice to the attorney will affect his client. In both these respects, Mrs. Fry must be considered as affected with the notice to her attorney. In 3 *Sugd. on Est.* 456, are stated the exceptions to the rule that notice to a solicitor is to be construed as constructive notice; and they are the same as those mentioned in *Hargreaves v. Rothwell*. In *Nixon v. Hamilton* (b), this question of notice to the solicitor was very fully considered, and a subsequent registered mortgage was postponed to a prior unregistered mortgage, upon the ground of notice to the solicitor of the second mortgagee. —[RICHARDS, B. Lord PLUNKET appears to have gone further in that case than in *Smith v. Smith* (c).]—He refers to that case, and says that if his language meant that the notice should be proved to be in the same transaction, and could not be by other circumstances, that was no longer his opinion. The case of *Le Neve v. Le Neve* (d) is precisely in point, and must decide the present case, which is really a stronger one than any that has been cited; for here is an attorney employed by the defendants to dispose of an equity of redemption to one person to-day, he being a party to a transaction by which the very same equity of redemption is disposed of to another a few days afterwards.

Mr. *Monahan*, Q. C., in reply.—No case has been cited, and no case has been found, to shew that notice to an agent is more than constructive notice to the principal. The case of *Nixon v. Hamilton* has no applica-

(a) 1 Keene, 154.

(b) 1 Ir. Eq. Rep. 46.

(c) 2 Law Rec. 2d. S. 57.

(d) 3 Atk. 646; S. C., Amb. 645.

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tion ; it was not decided upon the ground of notice, but upon direct and positive fraud in the agent. Here there is no pretext for an allegation of fraud, because Mrs. Fry's debt was contracted long before the debts of these persons, who never endeavoured to postpone her demand. The notice, also, of Mrs. Fry's attorney was acquired in a wholly different transaction, and upon the authority of *Smith v. Smith*, and many other cases, cannot for that reason affect his client. It is unnecessary to contend that the agent of Mrs. Fry had not notice ; it is sufficient to shew that there was no fraud on his part.—[RICHARDS, B. If *Nixon v. Hamilton* be law, is not an attorney who conceals a fact of which he is aware while dealing with another party (as Mr. Brady did here), guilty of fraud ?—I do not mean of moral, but of legal fraud.]—Not if we can sustain the second branch of this case, viz., the right of this lady to resort to her bond, in respect of which, it is submitted, she is entitled to follow these premises, as assets of Dunne's in the hands of the defendants, for the payment of debts secured by his bond. The cases of *Hill v. Simpson* (a), and *M'Cleod v. Drummond* (b), decide that a creditor of the testator has a right to follow funds paid away *bona fide* to third persons by executors for their own debts ; and in this case the defendants are here the voluntary assignees of the executors of Dunne, and cannot therefore stand in any better position than they would be in, and the creditors are creditors of theirs and not of Dunne's ; and therefore, upon the authority of these cases, if they had absolutely paid over to these creditors the produce of the sale of the premises, we would have a right to follow those funds in the hands of the creditors. If this position be correct, there was neither legal nor moral fraud in Mrs. Fry's attorney hastening to file a charge, instead of filing a bill, by which she could compel whatever parties got possession of these assets, to account to her for them. The cases of *Wyatt v. Barwell* (c) and *Popham v. Baldwin* (d) are authorities quite decisive that notice, such as is relied on in the present case, cannot postpone a registered deed.

Wednesday, February 19th.

The case stood for consideration until this day.

RICHARDS, B.

In this case, Bridget Fry claims under a registered mortgage of an equity of redemption, executed by the several parties thereto, according to the following dates, viz., by Jane Mary Kyan, on the 2d February 1839 ; by Catherine Cunningham, on the 5th February 1839 ; by John Francis M'Cabe, on the 6th February 1839 ; by the grantee, and now claimant, Bridget Fry, on the 7th February 1839, on which day it was registered.

(a) 7 Ves. 152.

(c) 19 Ves. 435.

(b) 19 Ves. 152.

(d) 2 Jones. 330.

This mortgage was obtained for the purpose of securing a debt really and *bona fide* due and owing by two of the mortgagors to the mortgagee Bridget Fry. There is no question, therefore, as to the nature or sufficiency of the consideration. The priority of the mortgagee under this mortgage is disputed by certain other creditors of the mortgagors, who having brought actions against one of the mortgagors, Jane Mary Kyan, afterwards agreed that their proceedings in such actions should cease, upon certain terms; that is to say, "that they should be paid the amount of their respective demands when proved, together with the costs of proving same, out of the produce to be realised by a sale of the mortgaged premises in the pleadings in this cause mentioned, after payment of such prior incumbrances as should be reported due, and of the principal and interest of the mortgage debt in the pleadings mentioned, and of the costs and expenses of the several parties, plaintiffs and defendants in the cause, without prejudice to the rights of any other parties." And this agreement or arrangement was accordingly made the subject matter of a consent in this cause, bearing date the 19th of January 1839, which is reported to have been signed by the debtors Kyan and Cunningham, and also by their trustee Mr. M'Cabe, at all events before the 2d of February 1839, and to have been made a rule of Court in this cause on the 9th of February 1839. I should premise that this consent was in no way calculated to affect, or interfere with the rights of the plaintiff in this cause. The plaintiff was confessedly prior to the parties at both sides now litigating the present question. He was a first mortgagee of the premises, and he had filed his bill to foreclose, or, as is the case in this country, for a sale of the mortgaged premises which were held under a lease for years; and consequently the consent, and also the mortgage to Fry, professed to deal only, and could deal only, with the equity of redemption in the mortgaged premises, or with what might remain in case of a sale, after the payment of the plaintiff in this cause.

If the question submitted by the Officer were to be decided merely with reference to the periods of the execution of the mortgage, as contrasted with the date of the consent or order thereon, I would at once hold that the mortgagee Fry had a plain and clear priority over the parties claiming under the consent. But it is said by those who rely on the consent and order, that the mortgagee Fry had notice, before she accepted the mortgage, of the rights of the parties deriving under the consent, and of all the circumstances under which that consent was executed; and assuredly, if that can be shewn, it ought manifestly to prevent the mortgagee Fry from relying upon her mortgage to defeat the rights of these other parties.

It is said, however, on behalf of the mortgagee, that although true it is, her attorney and agent in the mortgage transaction had notice of all

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the circumstances that had taken place concerning the consent, and may even have been an active agent for the debtors, or one of them, in getting up and procuring the completion of that document (as no doubt he was), yet that his client Mrs. Fry, who does not happen to have had any personal notice of these matters prior to her accepting the mortgage, ought not to be prejudiced by reason of her attorney and agent having had knowledge of them, or by reason of his having acted as stated in the Officer's report; and that for two reasons—first, because nothing short of *actual* notice, as it is contended, is sufficient to prevent a party from relying on a priority gained by the registration of his deed under the Registry Act; that constructive notice will not be sufficient for that purpose; and *Wyatt v. Barwell* and cases of that class have been referred to; and further, that notice to an attorney is nothing but constructive or implied notice, and is not to be treated or considered as notice to affect a party claiming under a registered deed. Secondly, that notice to an agent or attorney (if such a species of notice be at all applicable to the case of a registered deed) must be a notice to, or knowledge acquired by the attorney or agent in the same transaction; that in this case, whatever Mr. Brady the agent knew of the consent and of the dealing between the parties in regard to it, he knew and became acquainted with in a different transaction altogether from that in which he was employed by Mrs. Fry, and that it was not as her agent, or in any way in connexion with her agency, that he obtained such notice or knowledge of the previous matters.

With respect to the first position relied on by the counsel for Mrs. Fry, I am of opinion that notice to the attorney is not to be considered as implied or constructive notice merely, such as was held in *Wyatt v. Barwell* to be insufficient to affect a party claiming under a deed registered in England pursuant to the Registry Act there referred to. I take it, that implied or constructive notice is properly referable to something which a party or his agent ought, if reasonable diligence had been used on his behalf, to have acquired a knowledge of; but which, possibly, neither he nor his agent ever did know or acquire any knowledge of, such as the title of a tenant in possession of an estate purchased, or the like. But I do not understand that that which is expressly communicated to or known by the attorney or agent of the party is to be considered as implied or constructive notice merely. If notice to an agent were to be considered as merely implied notice to the party, in many of the transactions of mankind it would be almost impossible to affect a party with actual notice, as may upon a little reflection be easily conceived; and so to hold would, in my opinion, open a door to great fraud, and go far to oust the jurisdiction which Courts of Equity have exercised on this subject, and with much advantage to the public, for a considerable length of time; but the point has, in my opinion, been

already decided by Lord Hardwicke, in *Le Neve v. Le Neve* (a); and, indeed, the same principle was acted on in the very early Irish case on the Registry Act, of *Lord Forbes v. Deniston* (b). I am, therefore, of opinion, that such notice to, and knowledge by the attorney of a previous transaction, as is shewn to have existed in this case, is sufficient notice to prevent a party claiming under a subsequent deed from gaining a priority by force of the registry of his subsequent deed, over a party having a prior equitable lien on the land, such as that acquired by the creditors by virtue of the consent in this case.

With respect to the second position relied on by the counsel for Mrs. Fry, I admit that, as a general proposition, notice to an agent, so as to affect his principal, must be in the same transaction; but this rule admits of some exceptions, or rather qualifications: for instance, if the notice comes to the agent so immediately before the transaction in question that it is impossible he could have forgotten it; or if it appears, as in my opinion it does in this particular case, that the attorney, at the time he was engaged in negotiating or assisting in carrying out the first transaction, was, in point of fact, concocting a plan to defeat the rights of the parties trusting to the security of such first transaction;—if such be the case, I can have no hesitation in holding, that the notice which such an attorney or agent has, while acting in the first transaction, is sufficient to overreach the subsequent dealing in which he thinks fit to engage for another client.

Now, look to the dates in this case. The transactions incident to the consent were pending from the 1st October 1838, until the final completion of the consent, that is, until the 2d of February 1839; and Mr. J. J. Brady was an active agent throughout the most of these proceedings, and actively engaged in procuring the parties to the consent—I mean the creditors—to agree to accept the consent, and to give up their proceedings at law against their debtor; and yet we find this same Mr. J. J. Brady, on the same 2d of February, before the ink is well dry on the consent—the signature to which by Mrs. Cunningham he had himself just witnessed—procuring one of the parties and debtors, Mrs. Kyan, who had just signed the consent, to execute the mortgage to Mrs. Fry, which is now relied on to defeat this consent, and to deprive the parties trusting to it of the possibility of deriving any advantage under it. Surely it is manifest, that at the very time Mr. Brady, as the agent of the debtor, was soliciting the creditors to sign the consent, he was preparing the mortgage deed for his other client, Mrs. Fry, and only waited until he could, as he imagined, bind and tie up the parties, by procuring their signatures to the consent to get the mortgage to Fry executed.

It is plain, therefore, to my understanding, that Mr. Brady not only

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had notice of the rights of the creditors to the consent, but was a party inducing these creditors to rely on the faith of such consent, at the very time that he undertook to act for Mrs. Fry; and I am of opinion that, with reference to the notice and knowledge which Mr. Brady had of the rights of these consent creditors, it is impossible to say that he had such knowledge while acting in the first transaction alone; but if the facts were not in that respect as strong as they are, the decision of Lord Eldon, in *Mountiford v. Scott* (a), on appeal, or rather the language which he uses in that case, and the decision of Lord Langdale, the present Master of the Rolls, in *Hargreaves v. Rothwell* (b), would be sufficient to warrant me in binding Mrs. Fry by the knowledge which Mr. Brady had acquired in the transaction in which he was, so immediately before the execution of her mortgage, engaged with the other creditors. In the former case, Lord Eldon observes, "The Vice-Chancellor in this case appears to have proceeded upon the notion, that "notice to a man in one transaction is not to be taken as notice to him "in another transaction. In that view of the case, it might fall to "be considered, whether one transaction might not follow so close "upon the other, as to render it impossible to give a man credit for "having forgotten it. I should be unwilling to go so far as to say, that "if an attorney has notice of a transaction in the morning, he shall be "held, in a Court of Equity, to have forgotten it in the evening: it "must in all cases depend upon the circumstances." In these observations Lord Langdale, in the latter case, expresses his entire concurrence.

Another point, however, was urged at the bar for Mrs. Fry. It is said that she was, in point of fact, not merely the creditor of Mrs. Kyan and Mrs. Cunningham, but also the creditor of Mr. Dunne, who had executed his bond to her for the money borrowed from her for his *cestui que trusts*; and no doubt she was. But then it is said, that inasmuch as Dunne was originally possessed of this chattel interest, though he held it but as a trustee for Kyan and Cunningham, and others who are now dead, it was not competent for Dunne's representative to have declared the trust in the chattel in question, or to have assigned over the same, except subject in the first instance to the debt due to Mrs. Fry. Now, I do not go with that reasoning. The chattel interest, in fact, belonged to Kyan and Cunningham (I omit the names of the others of the community who are dead), and it was quite right in the representative of Dunne to assign such interest to his *cestui que trusts* on the death of Dunne. Had he pleased, he might, no doubt, have stipulated for indemnity against the bond in question; and how do I know that he did not do so? No complaint is made on the part of Dunne's represent-

(a) Tur. & R. 274.

(b) 1 Keene, 164.

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atives, nor do they appear in the cause, or on this application. But I do not see upon what principle Mrs. Fry can avail herself as against the consent creditors, of any right or equity which Dunne's representatives might originally have had, before assigning the premises to the *cestui que trusts*; nor do I see what there was to prevent the owners of the property, on the same having been assigned to them, from doing with it what they pleased, and from giving to the creditors, who were suing them in personal actions, a lien in preference to Mrs. Fry, of whom those creditors knew nothing. But, I ask, what notice could the consent creditors have had that Mrs. Kyan and Mrs. Cunningham were giving a lien on property not their own, or on property which was subject to any latent equity of the nature suggested?

Suppose they had known the reality of the circumstances attendant upon this property—which is as strong a way of putting the case as can well be desired against them—what could they have known, except that Dunne was a trustee in respect to this chattel interest, that Kyan and Cunningham were his *cestui que trusts*, and that on Dunne's death his personal representatives assigned over the trust property absolutely to these *cestui que trusts*? Would not all this go to negative the notion that any other person had, or could have, any claim upon such property? And how could these creditors be presumed to know, or even to suspect, that there was any impediment to their debtors doing whatever they thought fit with such property?

I therefore do not see, I confess, how this latter point relied on by the counsel for Mrs. Fry can be brought to bear upon the subject, or brought within any principle upon which the Court could act, to defeat the rights of the consent creditors; but be that as it may, I am of opinion that the relinquishment of the actions by these creditors against Mrs. Kyan, and the agency in that transaction of Mr. Brady, and the impossibility now of restoring those parties to the situation in which they were when they so relinquished their proceedings at law, would of itself be sufficient to prevent Mrs. Fry, if she had an equity such as was relied upon by her counsel (but which I do not think she had or has as against these parties), from now setting up the same—regard being had to the agency of her attorney, Mr. Brady, in the transaction, and to his concealment of any such equity from the consent creditors up to the 2d of February 1839,—at and prior to which time he must, from the dates which I have mentioned, have been the agent of Mrs. Fry, and perfectly cognizant of her rights.

Upon all the grounds, therefore, upon which this case has been argued, I am against Mrs. Fry, and I rule that she must be postponed to the creditors claiming under the consent, and order thereon.

Saturday, January 25th.

CHARITY—SCHOOL—TRUST—CY-PRES—52 G. 3, c. 101.

In the Matter of the Trustees of Lady BELVEDERE's Charity, and of the Act of the 52d G. 3. c. 101.

The Court has jurisdiction to authorise the establishment of a charity *cy-pres* on a petition presented under the 52 G. 3, c. 101.

PETITION presented under Sir S. Romilly's act (52 G. 3, c. 101),* stating the will of Jane Countess of Belvedere, whereby she bequeathed to the petitioners "the sum of £6000, to be put to well secured interest at £5 "per cent, for the use of the female school of Tyrrellpass,"—where she directed that "thirty-six orphan children should be brought up in the "Protestant religion;" and whereby she also devised a house and eight acres of land "for the comforts and purposes of said school." The petition further stated, that the testatrix died on the 25th of October 1836, and that George Augustus Boyd is now her personal representative. That the said will was not executed so as to pass real estate, and that, therefore, the devise of the house and land failed, whereby the resources of the charity were considerably diminished.

That the petitioners were willing to accept the trusts, but that it was impossible to carry the intentions of Lady Belvedere literally into effect. That it now became necessary to expend a considerable sum out of the funds of the charity in building a suitable house for the reception of the children; and that it was impossible, from the diminished resources of the charity, to maintain and educate the number of children directed by Lady Belvedere.

The petition, therefore, prayed that it might be referred to the Chief or Second Remembrancer to devise and settle a scheme for the future regulation of the charity, and for the due administration of the funds thereof, according to the intention of the testatrix, so far as the same might be carried into effect—and that such further order might be made as might be proper for the establishment and regulation of said charity.

Mr. Pilkington now moved the matter of the petition, and referred to the cases of *Ex parte Lane in re Kingsbridge School* (a), and *Ex parte Fowler* (b).

(a) 4 Mad. 479

(b) 1 Jac. & Walk. 70.

* The first section enacts—"That from and after the passing of this act, in every case of a breach of any trust, or supposed breach of any trust, created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, or Master of the Rolls for the time being, or the Court of Exchequer, stating such complaint and praying such relief as the nature of the case may require; and it shall be lawful for the Lord Chancellor, Lord Keeper, and Commissioners for the custody of the

Baron RICHARDS, who was sitting alone, expressed a doubt as to the jurisdiction of the Court to authorise the administration of the funds of the charity *cy-pres* upon petition under the act, intimating that it was by no means clear that it could be done save by a plenary suit.

Saturday, February 1st

His Lordship on this day stated, that he had carefully considered the matter, upon which he had at first entertained very serious doubts, but that he was now satisfied he had jurisdiction to make the order according to the prayer of the petition—and directed that it should be set down in the list of short causes, for the sixth of the eight days after this Term—the personal representative of Lady Belvedere, the Attorney-General, and the Commissioners of Charitable Donations to have notice.

Friday, February 7th.

The matter having been again moved, and Baron RICHARDS having informed the other Members of the Court then present* of the object of the petition, their Lordships made the following order:—

Refer it to the Chief or Second Remembrancer to settle and approve of a proper scheme for the regulation of the said charity, and for the administration of the funds thereof, according to the intention of the testatrix, so far as the same may be carried into effect. The said George Augustus Boyd to have the costs of this matter out of the charity estate, and let the petitioners pay such costs when taxed. The Attorney-General and the Commissioners of Charitable Donations and Bequests, and such other persons as the said Chief or Second Remembrancer shall direct, to have notice of the proceedings under this order.

* The CHIEF BARON and Baron PENNEFATHER.—Baron FOSTER presided at *Nisi Prius*.

“Great Seal, and for the Master of the Rolls, and the Court of Exchequer, and they are hereby required to hear such petition in a summary way; and upon affidavits, or such other evidence as shall be produced upon such hearing to determine the same, and to make such order therein, and with respect to the costs of such application, as to him or them shall seem just; and such orders shall be final and conclusive, unless the party or parties who shall think himself or themselves aggrieved thereby, shall, within two years from the time when such order shall have been passed and entered by the proper Officer, have preferred an appeal from such decision to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order.”

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In the
Matter of
Lady
BELVE-
DERE'S
Charity.

Monday, February 17th 1840.

BILL FOR SPECIFIC PERFORMANCE—PRACTICE—DISMISSAL OF
BILL—JURISDICTION—RECOGNIZANCE—MESNE RATES.

POPHAM and others, v. BALDWIN and others.

Bill for specific performance of an agreement to grant a lease and for an injunction to restrain execution of an *habere*. On the coming in of the answer the injunction was continued on the terms of plaintiffs giving security for the *mesne* rates by recognizance. On the hearing of the cause the bill was dismissed with costs, whereupon the defendant brought an action for the *mesne* rates against the plaintiffs, and recovered judgment at law. Upon motion of the defendant's executor, the plaintiffs were ordered to pay the amount of the judgment within 10 sitting days after service of the order.

Notwithstanding the dismissal of the bill, the Court retains jurisdiction to make such an order, the recognizance being substituted, in case of the plaintiff, even after the dismissal of the bill, of the money.

MR. LESLIE in this case applied to the Court in last Michaelmas Term for a conditional order upon the plaintiffs to pay to the defendant Henry Baldwin, eldest son and executor of Henry Baldwin the defendant, deceased, the sum of £240 for *mesne* rates of the lands of Mossgrove in the pleadings mentioned.

The affidavit of H. Baldwin, on whose behalf the application was made, stated that the bill in this cause had been filed against him and his father, now deceased, and the other defendants, for the purpose of having an agreement for a lease declared binding upon deponent's father and the other defendants, and to restrain them by injunction from executing an *habere* upon a judgment in ejectment obtained by them against the plaintiffs. It stated that the judgment was obtained in Trinity Term 1832, and shewed from deeds proved in the cause to which it referred, that at the time of obtaining this judgment in ejectment, the legal estate of freehold in these lands was (subject to a term of 500 years, the trusts of which were almost all executed) vested in Henry Baldwin now deceased, for life, remainder to H. Baldwin the deponent, for life, remainder to his eldest son in tail—there were also terms for securing portions for younger children after the respective life estates of H. Baldwin the elder and H. Baldwin the younger, which caused the trustees to be made parties defendants in the cause, demises having been laid in their names.

The affidavit further stated, that by an order made in the cause, bearing date the 16th day of November 1833, it was ordered that an injunction which had been obtained in the cause should be continued, on the terms of the plaintiffs giving security for *mesne* rates on the first day of the then next Term, and speeding the cause. That by an order, bearing date the 4th December 1833, it was referred to the Chief Remembrancer to measure the amount of the security;—that by his report, bearing date the 24th December 1833, he measured the amount to £800. That thereupon John Popham, one of the plaintiffs, and two other persons named, entered into their joint and several recognizance to the amount of £800, conditioned, that "If the plaintiffs (naming "them) did and should, from time to time, well and truly pay, or cause

for an actual lodgment of the money in Court, in which case the Court, even after the dismissal of the bill, would have jurisdiction to make an order for payment

"to be paid all such *mesne* rates of the lands and premises in the
 "pleadings in this cause mentioned, as should or might at any time
 "thereafter be ordered or awarded, adjudged, or decreed against them
 "in this cause, then the recognizance should be void," &c.

It further appeared that by a decree of the Court made upon the hearing of the cause, the bill was dismissed with costs on the 19th of January 1837 (a); that Henry Baldwin the elder thereupon executed his *habere* and brought an action of trespass for *mesne* rates against the plaintiffs, and in Michaelmas Term 1838 obtained a judgment against them for £240, which still remained unpaid: that H. Baldwin the elder died on the 23d of November 1838, leaving the applicant his eldest son, and having appointed him executor of his will, of which he obtained probate.

The affidavit then proceeded to account for the lateness of the application, and stated that the object was to obtain an order which might enable the deponent to sue on the recognizance.

Mr. Leslie referred the Court to the case of *Costello and another v. Hunt*, as exactly similar to the present.*

(a) See the case since reported, 2 Jones, 320.

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* Mr. Leslie stated the facts, and handed up to the Bench the several orders in the case of *Costello v. Hunt*.

In that case, as in the present, the bill was filed for the specific performance of an agreement for a lease and for an injunction to restrain execution of an *habere*. On motion to continue the injunction on the coming in of the answer, an order was made on 25th June 1832, for the continuance of the injunction, on the terms of the plaintiffs giving security for *mesne* rates, and undertaking to abide such order as the Court should make. A recognizance was accordingly entered into "that plaintiffs should "pay such *mesne* rates and costs "as should or might be ordered, "awarded, adjudged, or decreed "against them in the cause."

On the 25th April 1834, the

bill was dismissed with costs. On the 3d February 1836 a conditional order was obtained for the plaintiffs to pay defendant £154, for *mesne* rates, the amount sworn to—the costs of the ejectment having been paid. On the 22d June this order was made absolute, no cause being shewn. On the 26th November 1836 a conditional order for an attachment was obtained against plaintiffs for not obeying the last order, and on the 1st of May 1837 that order was made absolute, no cause being shewn against it. The attachment issued and the sheriff returned *non est*. On the 14th of June 1837 a conditional order was obtained for liberty to sue on the recognizance, serving the plaintiff who was a party to it, and his sureties; and on the 13th January 1838 this order was made absolute.

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The motion stood over until this Term, Baron RICHARDS, before whom the application was made, not having been present at the decision in *Costello v. Hunt*, and wishing to consult the other Members of the Court.

Monday, February 17th 1840.

On this day the application was renewed before Baron PENNEFATHER, by Mr. *Leslie*, who now moved that the plaintiffs, or some or one of them, do pay the defendant Henry Baldwin the sum of £240, being the amount of the judgment obtained by Henry Baldwin deceased against the several plaintiffs, within a fortnight; or in default thereof, that the said defendant may be at liberty to proceed against the plaintiffs' sureties.

PENNEFATHER B.

This case comes before the Court in a form which is freed from a difficulty that existed in *Costello v. Hunt*; the *mesne* rates having been here ascertained by the verdict of a jury, while in that case they were ascertained merely by the affidavit of the party. Such a mode of ascertainment may be attended with difficulties, but in the discussion of the case of *Costello v. Hunt*, the attention of the Court was not drawn to the manner in which the *mesne* rates had been ascertained; on the contrary, it was taken for granted in the argument, and the Court was therefore justified in assuming, that the *mesne* rates had been properly ascertained; the case being put altogether upon the ground that the Court had not jurisdiction to make the orders, in consequence of the bill having been dismissed. I wish it to be distinctly understood that the Court in that case was not called on to give, nor did it give any opinion as to the manner in which the *mesne* rates had been ascertained. The Court there held that it had jurisdiction to make the orders which it was sought to set aside; and that the recognizance was to be viewed precisely in the same way as if the money had been brought into Court; in which case, there could have been no doubt that it would have had jurisdiction to make an order for the payment of the money out of Court. We were of opinion that our jurisdiction was not gone by the dismissal of the bill. In fact, it is that which establishes the right of the defendant in equity (the plaintiff at law) to sue upon the recognizance; and it were absurd to say that the very same act which establishes the right of the defendant

On the 2d of June 1838 an application was made on behalf of the sureties, to set aside the orders of the 3d February, and 22nd June 1836, obtained by the defendant against the plaintiffs for payment of the *mesne* rates, after the decree of dismissal in the cause.

It was contended for them, that the bill having been dismissed, the Court had not jurisdiction to make these orders.—The question was very fully argued before Barons PENNEFATHER and FOSTER, and the Court refused the motion without costs.

to sue, is to defeat the jurisdiction of the Court, or deprive it of its power to act on and enforce the recognizance.

I was then, as I am now, of opinion, that notwithstanding the dismissal of the bill the Court retains jurisdiction to wind up the cause, and that the recognizance for the payment of the *mesne* rates is to be considered as substituted in case of the plaintiff in the suit, for an actual lodgment of the money. The Court would not grant the injunction restraining the plaintiff at law from the exercise of his legal rights, without making him secure against any loss or injury; and to make him secure, a sum of money equivalent to the *mesne* rates ought in strictness to be brought into Court; and if that were done there can be no question, as I have already observed, that the Court would have jurisdiction notwithstanding the bill being dismissed, to make an order for payment of the money out of Court (a). In short, I consider the recognizance, which is conditioned for payment of the *mesne* rates, as a boon to the plaintiff, and one which is granted to him and his sureties upon an express understanding and consent that the Court shall be at liberty to make any order touching the recognizance, which the justice of the case may require, or which might be made were the money brought into Court. That was the principle of the decision in *Costello v. Hunt*, and in the soundness of that principle I have the authority of my Brother RICHARDS to state he fully concurs.

I think then there is full jurisdiction remaining in the Court to adjudicate upon the recognizance; and this case being freed from any difficulty with respect to the *mesne* rates, which have been ascertained in a way which is quite unobjectionable—(I mean by the verdict of a jury in an action of trespass brought against the persons in possession of the lands) I have no hesitation, under the circumstances, in granting a conditional order for their payment.

COURT.—Let the plaintiffs pay to the said defendant Henry Baldwin, executor of said Henry Baldwin deceased, the sum of £240; being the amount of the judgment obtained by said Henry Baldwin *as such executor* against the plaintiffs, unless cause in ten sitting days after service of this order.*

(a) See acc. *Wright v. Mitchell*, 18 Ves. 293; *Black v. Creighton*, 2 Moll. 557; *Jennings v. Nugent*, 1 Moll. 134; *Roundell v. Curren*, 6 Ves. 250; *Wharam v. Broughton*, 1 Ves. sen. 185.

* There is obviously a *verbal* error in the above order, the judgment having been obtained by Henry Baldwin deceased, and not by his executor. The mistake, however, it will be seen, was subsequently corrected when the order came to be made absolute.

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Tuesday, June 23d.

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v.
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Mr *Collins* (with whom was Mr. *Leslie*) on this day moved to make the conditional order of the 10th of February last absolute, notwithstanding the affidavits filed as cause against the same.

Mr. *Townsend*, for the plaintiffs.

COURT.—Make the said conditional order absolute, and let the plaintiffs pay to said defendant Henry Baldwin, executor of said Henry Baldwin deceased, the sum of £240, being the amount of the judgment obtained by said Henry Baldwin deceased, against the plaintiff.

Friday, February 7th.

PRACTICE—EXECUTING SEQUESTRATION UPON DECREE.

WELSH v. WELSH.

Notice of motion for liberty to execute a sequestration upon a decree is necessary, where it is sought to execute it against lands.

MR. *CASSERLY* moved for liberty to issue and execute a writ of sequestration upon a decree.—[*RICHARDS, B.* Have you given notice of the motion?]
—It is conceived that notice is not necessary, and it was so held in the case of *Monk v. Lawlor* (a).

PENNEFATHER, B.—That was a case where the sequestration was ought to be executed against moveables. The rule is, that if the sequestration is sought to be executed against the goods, no notice of the motion is necessary, as it might defeat the object of it; but if it is sought to be executed against the lands, notice must be given, because the Court might limit it against *certain* lands.

RICHARDS, B.—Are you willing to limit your application against the goods?

Mr. *Casserly*.—That would be of no use to us.

COURT.

No rule.

(a) 1 Jones, 554.

Friday, February 7th.

JUDGMENT—INTEREST—RECEIVER.

SOUTHEY, Petitioners; BATEMAN, Respondent.

MR. MOLYNEUX moved, on behalf of the petitioners, for the appointment of a Receiver, under the 5 & 6 W. 4, c. 55.

The judgment was obtained in Michaelmas Term 1839, in an action on four bills of exchange. The affidavit stated that the sum of £229 was due for debt and costs, and £2 for accruing interest.—[RICHARDS, B.* You cannot recover interest in a proceeding like the present.]—It has been decided that a creditor by judgment is entitled to interest, if it has been obtained upon a demand which bore interest.—[RICHARDS, B. He is entitled to interest if he proceed by action on the judgment.]—Or in an equity suit.—[RICHARDS, B. Yes, in a plenary suit; but a proceeding under this statute is a substitute for an execution by *elegit*, and the creditor would not be entitled to mark his execution for interest.]

The Court will not allow interest on a judgment obtained upon bills of exchange, where the plaintiff seeks his remedy by petition for a Receiver under the 5 & 6 W. 4, c. 55.

Conditional order for a Receiver to recover the net amount of the judgment.

* *Solus.*

Friday, January 24th, Saturday, January 25th.

CREDITOR'S SUIT—STATUTE OF LIMITATIONS—3 & 4 W. 4, c. 27,
s. 42—JUDGMENT—INTEREST—PLEADING—ISSUE—DECREE—
TRUSTS OF WILL—MORTGAGE—PRACTICE—DEBT.

O'KELLY v. BODKIN.

By indenture of mortgage bearing date the 1st of May 1822, and made between John Bodkin of the one part, and Anthony Clarke of the other

Where a creditor's suit was commenced before the passing of the

3 & 4 W. 4, c. 27—*Held*, that the claim of a judgment creditor who subsequently came in and proved his debt in due course under the decree was unaffected by the operation of that statute.

Had it been necessary to make a special application to the Court for liberty to prove the debt, grounded upon a denial of the creditor's knowledge of the existence of the suit, it would have been otherwise.

If the frame and prayer of a bill be essentially that of a creditor's bill, the omission of the usual introductory statement, that it was filed on behalf of the plaintiff and the other creditors who should come in and contribute, &c., is immaterial, such averment being matter of form merely.

A creditor coming in under a decree cannot rely upon a will as creating a trust in his favor, unless it have been put sufficiently in issue for that purpose either by the pleadings in the cause, or by the charge or discharge in the office.

Upon the true construction of the 3 & 4 W. 4, c. 27, s. 42, more than six years' interest cannot be charged upon land in respect of a sum of money secured by judgment.—*Per FOSTER, Baron.*

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part, reciting that there was then due and owing for principal, interest and costs on foot of two several judgments therein mentioned, the sum of £4265. 18s. 10d. ; he, the said John Bodkin, for the better and more effectually securing £3333. 7s., parcel of the above sum, granted and conveyed to Clarke certain lands and premises, subject to the usual covenant for redemption. This mortgage was assigned by Clarke to one Festus O'Kelly, by whom it was subsequently assigned to the plaintiff.

On the 27th October 1832, the plaintiff filed his bill in this cause, claiming to be entitled to the beneficial interest in the said judgments, to the extent of the sum secured by the mortgage. The bill stated that John Bodkin died on the 21st of May 1831, leaving John Dominick Bodkin (one of the defendants) his only son and heir-at-law, him surviving ; and charged that it was alleged by the defendants that the said John Bodkin, before his death, duly made and published his last will and testament in writing, bearing date the 30th of September 1830, and thereby appointed the said John D. Bodkin his sole executor, and that he died without having revoked or altered his will. That the said John D. Bodkin shortly afterwards duly proved the will, &c., and was now the sole legal personal representative, as well as the heir-at-law, of the said John Bodkin.

The bill further charged, that the said John Bodkin was at the time of his decease, seized and possessed of considerable real, freehold, and personal estate over and above the said mortgaged premises, all of which had come to the possession of the said John D. Bodkin as such heir-at-law and personal representative.

The bill did not profess to be filed on behalf of all creditors who should come in, &c., but prayed that an account might be taken of what was due to plaintiff on foot of said judgments and mortgage ; and that the said J. D. Bodkin might be decreed to pay what should appear due upon taking such account, by a short day, &c. ; and in default of such payment, and unless he should admit assets sufficient to satisfy plaintiff's demands, that an account might be taken of the real, freehold, and personal estate and effects, whereof John Bodkin died seized and possessed ; also an account of his debts, legacies, funeral and testamentary expenses, and all incumbrances affecting the lands and premises whereof the said John Bodkin died seized or possessed ; and that plaintiff might be paid the sum remaining due to him on foot of the said judgments and mortgage, in due course of administration, out of said testator's personal estate ; and that all other creditors and legatees of the said John Bodkin might, in like manner, be paid their demands thereout ; and in the event of said personal estate proving insufficient for the payment of plaintiff's demands, that the real and freehold estates of the said testator, or a competent part thereof, might be sold, and that out of the

money to arise from such sale, the demands of the plaintiff, and of such other persons as the Court should deem to be properly payable thereout, might be paid and satisfied, &c. ; and for a Receiver.

By a decretal order, pronounced on the 23d June 1835, it was directed that the bill should be taken as confessed against the defendant John D. Bodkin ; and it was thereby referred to the Officer to take an account of the sum due to the plaintiff on foot of the mortgage and judgments in the pleadings mentioned ; and of all charges and incumbrances affecting the mortgaged lands and premises prior to said mortgage ; and also to take an account of the real and freehold estates of said John Bodkin, deceased ; and also of his personal estate, and of his debts, legacies, and funeral expenses ; and of all charges and incumbrances affecting the said real and freehold estates, and the nature, priority, and amount thereof, &c.

In pursuance of this decretal order, the Remembrancer made his report, dated the 1st November 1838, whereby, amongst other matters, he found that John Bodkin was in his lifetime, and at the time of his death, seized of the equity of redemption in the mortgaged premises, and also seized in fee-simple, and of a freehold estate respectively in other lands and premises in the report mentioned. That the said John Bodkin being so seized, departed this life on or about the 21st of May 1831, having previously made his will, bearing date the 30th September 1830, and thereby devised and bequeathed unto his son John D. Bodkin, the defendant in this cause, all his property of every description, real, freehold, and personal, to which he was not already entitled under a certain settlement therein alluded to, subject, however, in the first place to the payment of all his (the testator's) just debts. That the testator by his will also bequeathed certain legacies set forth in the report, and appointed the said John D. Bodkin, his eldest son and heir-at-law, his sole executor.

The Remembrancer further found that after the death of John Bodkin, the defendant John D. Bodkin proved the will and entered into possession of the said lands and premises, and received the rents, issues and profits thereof, and applied the same to his own use up to the 1st of November 1833, when a Receiver was appointed in this cause, who had since received the rents. That he did not find that John Bodkin died possessed of any personal property, no evidence thereof having been laid before him.

The Remembrancer further found, that the said John Bodkin by his bond, with warrant of attorney for confessing judgment thereon, bearing date the 11th of February 1805, became bound to one Martin O'Neill in the penal sum of £824 then sterling, conditioned for the payment of £412, with interest and costs ; and that the said Martin O'Neill in or as of Trinity Term 1811, duly entered up judgment in the Court of

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Common Pleas upon said bond. That Phelim O'Neill (in whom the said judgment had become vested by assignment), on the 19th January 1836, filed a charge in this cause on foot of said judgment, stating that the said principal sum of £412 late currency (being equivalent to the sum of £380. 6s. 2d. present currency), together with a sum of £249. 11s. 10d. for interest thereon from the 11th February 1825, to the said 19th January 1836, and the sum of £10. 6s. 7d. for costs, making together the sum of £640. 4s. 7d. present currency, was due to him on foot of said judgment, and that the same was a charge and incumbrance to that amount upon the lands and premises in the pleadings mentioned.

The report then proceeded in the following terms:—"I do not find "that any part of the said principal sum of £380. 6s. 2d., or of the "said sum of £249. 11s. 10d., so claimed for interest thereon, to the "said 19th January 1836, or said costs, have been paid or discharged, "no evidence thereof having been submitted to me; but inasmuch as the "defendant John Dominick Bodkin filed a discharge to said charge, and "thereby relied upon a certain act passed, &c. (3 & 4 W. 4, c. 27), I "disallowed said claim of interest for more than six years before the said "19th of January 1836, the day of filing said charge; and I find that "the sum of £412 late currency, being equal to the sum of £380. 6s. 2d. "present currency, for principal, and a sum of £136. 18s. 3d. for six "years' interest thereon next preceding the 19th January 1836, being "the date of filing the said charge, and the further sum of £63. 11s. 7d. "for further interest from the said 19th January 1836 to the 1st day of "November 1838, and the sum of £10. 6s. 7d. for costs, making "together the sum of £591. 2s. 7d., is due to the said Phelim O'Neill "on foot of said judgment, and is a charge and incumbrance upon the "lands and premises in the pleadings mentioned."*

To this report several exceptions were taken on the part of O'Neill, the judgment creditor.

First exception.—That the Remembrancer had found the sum of £200. 9s. 10d. only, due for interest on said judgment, whereas he ought to have found £313. 3s. 5d. due, there being no proof of any payment. Second exception.—That the Remembrancer had found the sum of £412 for principal, and £200. 9s. 10d. for interest, alone due on foot of said judgment, whereas he should have found the full sum of £824 due, no evidence having been offered that the condition in said bond or judgment had been performed. Ninth exception.—That the Remembrancer had found that the said John D. Bodkin was entitled to the benefit of the limitation in the 42d section of the 3 & 4 W. 4, c. 27, whereas he should not have found so, the said section not applying or being intended to apply to the case of interest claimed on foot of judgment debts, same not being charges on land within the meaning of said

* There were similar findings with respect to sums reported due to the said Phelim O'Neil, for interest, on foot of other judgments specified in the report.

act. Tenth exception.—Because even supposing said act did apply to cases of interest on judgments, yet the Remembrancer ought not to have so found, inasmuch as plaintiff's bill was filed long before the passing of the act; and was filed on part of a judgment creditor of the said John Bodkin deceased, against the said defendant (who claimed as devisee of the said John Bodkin), and prayed an account on foot of the sum due to the plaintiff in course of administration out of testator's personal estate, and that all other creditors, &c., might be paid their demands thereout, &c.; and inasmuch as the bill relied on the will of the said J. Bodkin, which made all property devised to the defendant subject, in the first place, to the payment of his debts; and inasmuch as the said P. O'Neill came in under the decree as one of the judgment creditors whose claims were so charged on said lands, and were so provided for by said decree.

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Mr. Smith, Q. C., and Mr. Berwick, Q. C., in support of the exceptions.

Mr. Henn, Q. C., and Mr. James Blake, Q. C., for the report.

In support of the exceptions, three points were made—First, that the 42d section of the statute of the 3 & 4 W. 4, c. 27, did not apply to the case of a debt secured by a judgment in a penal sum, where the creditor sought to levy no more than the sum really due, not exceeding the amount of the judgment. *Kealy v. Bodkin* (a); *Maxwell v. Dickson* (b); 1 *Hov. Supp.* 320; *Gaunt v. Taylor* (c); *Kirby v. O'Shee* (d); *Finch v. Earl of Winchelsea* (e); *Clarke v. Seton* (f); *Sharpe v. Earl of Scarborough* (g); *McClure v. Dunkin* (h); 5 *Bythe-wood's Conv. by Sweet*, 63. Secondly—Supposing that the 42d section of the statute did apply to the case of a judgment, the trust in the will of John Bodkin prevented its operation in the present case. *Fergus v. Gore* (i); *Hargreaves v. Michell* (k); *Hughes v. Wynne* (l); *Ex parte Ross* (m); *Salter v. Cavanagh* (n); *Kelly v. Kelly* (o); *Philipo v. Munings* (p); *Murphy v. Sterne* (q); 2 *Powell by Jarm.* 646–7–8. Thirdly—

(a) *Sausse & Scully*, 211; S. C. 5 *Law Rec.* 2 Ser. 241.

(b) 1 *Law Rec.* 2 Ser. 98.

(c) 3 *Mylne & Keene*, 310.

(d) 1 *Jones*, 574; and see *Sterling v. Wynne*, id. 64; *Tunstall v. Trappes*, 3 *Sim.* 306–7.

(e) 1 *Peere Wms.* 278; and see *Sugden on Estates*, 476; *Averell v. Wade*, L. & G. *temp. Sug.* 252; *Barnewall v. Barnewall*, 3 *Ridg. P. C.* 35.

(f) 6 *Ves.* 414.

(g) 3 *Ves.* 557.

(h) 1 *East*, 436; see *Godfrey v. Watson*, 3 *Atk.* 484.

(i) 1 *Scho. & Lef.* 108; see *Burke v. Jones*, 2 *V. & B.* 275.

(k) 6 *Mad.* 326; and see *Rendell v. Carpenter*, 2 *Younge & Col.* 484.

(l) 1 *Turn. & Russ.* 307; and see *Jones v. Scott*, 1 *Russ. & Mylne*, 255.

(m) 2 *Glyn. & Jam.* 46, 330.

(n) 1 *Drur. & Walsh*, 668.

(o) 6 *Law Rec.* 2 Ser. 222. (p) 2 *Mylne & Cr.* 309. (q) 1 *Drur. & Walsh*, 236.

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It was contended that the bill having been filed before the 3 & 4 W. 4, c. 27, was passed, the case did not come within the operation of the 42d section* of that statute, which was held not to apply to actions or suits commenced before the date of its passing; *Paddon v. Bartlett (a)*. The bill, although not filed expressly on behalf of creditors generally, was to all intents and purposes a creditor's bill. The whole frame and structure of the suit was essentially different from that of a mortgage suit, and the prayer was plainly that of a creditor's bill. It was not a mortgage suit, otherwise there would have been a prayer for payment out of the mortgaged premises, whereas the bill prayed an account of the testator's real, freehold, and personal estate; of all incumbrances affecting the lands, &c. of which he was seized, and a sale of *all* the real and freehold estates. The omission of a few formal words at the commencement of the bill could not change the structure of the suit. This being, therefore, a creditor's suit, a judgment creditor proving his debt under the decree was entitled to the benefit of the suit from the commencement; *Sterndale v. Hankinson (b)*; in which case it was held, that in a creditor's bill every creditor had an inchoate interest, and that the filing of the bill prevented the statute of limitations running against any of the creditors who came in under the decree. It was true, the bill there was stated to have been filed on behalf of creditors, but, for the reasons aforesaid, the omission of such statement from the bill in this case is immaterial.

For the report.—It was contended, first, that a debt secured by judgment was a sum of money charged upon land within the meaning of the 3 & 4 W. 4, c. 27, s. 42, restricting the recovery of interest to a period of six years. The judgment of the Master of the Rolls in *Kesly v. Bodkin*, it was argued, could not be sustained; and the cases of *Foley v. Dumas (c)*, *Price v. Varney (d)*, and *Barnewall v. Barnewall (e)*, were cited. Secondly.—It was objected that it was not open to

(a) 5 Nev. & Man. 383; S. C. 1 Har. & Woll. 477; 3 Ad. & Ell. 884.

(b) 1 Sim. 893.

(c) Smythe, 78.

(d) 5 D. & R. 612; S. C. 3 B. & C. 733.

(e) 3 Ridg. P. C. 36.

* The 3 & 4 W. 4, c. 27, s. 42, enacts "That after the 31st day of December 1833, "no arrears of rent or of interest, in respect of any sum of money charged upon, or "payable out of any land or rent, or in respect of any legacy, or any damages in "respect of such arrears of rent, or interest, shall be recovered by any distress, action, "or suit, but within six years next after the same respectively shall have become due, "or next after an acknowledgment of the same in writing, shall have been given to the "person entitled thereto, or his agent, signed by the person by whom the same was "payable, or his agent; provided, nevertheless, that where any prior mortgagee, or "other incumbrancer, shall have been in possession of any land, or in receipt of the "profits thereof, within one year next before an action or suit shall be brought by any "person entitled to a subsequent mortgage or other incumbrance on the same land, the "person entitled to such subsequent mortgage or incumbrance may recover, in such "action or suit, the arrears of interest which shall have become due, during the whole "time that such prior mortgagee, or incumbrancer, was in such possession or receipt "as aforesaid, although such time may have exceeded the said term of six years."

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the party taking the exceptions to rely upon the will of John Bodkin, as raising a trust for the payment of his debts, the will not having been put in issue with the view of raising that question, either by the plaintiff in the bill or the creditor in his charge. And in the next place, even admitting the will to have been put sufficiently in issue for the purpose of raising the question, it was contended that the trust created by it was not such a trust as to prevent the operation of the statute of limitations; *King v. Denison* (a); *Lord St. John v. Boughton* (b); *Burne v. Robinson* (c). Thirdly—It was argued that the present was not purely a judgment creditor's bill, the bill having been filed by the assignee of a mortgagee, who claimed an equitable interest in the judgments only to the amount of the mortgage. That the judgment of the Vice-Chancellor in *Sterndale v. Hankinson* (which was decided before the passing of the 3 & 4 W. 4, c. 27), rested mainly on the equitable jurisdiction then possessed by a Court of Equity either to give effect to the statute of limitations or not, as the justice of each particular case might require, but that such equitable or discretionary power had been taken away by the late statute, which applies to equitable as well as to legal proceedings. The effect of the former decision had been done away with by a recent case decided since the statute, in which it was held, that where a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, he was barred by the statute of limitations, notwithstanding a suit had been instituted within the twenty years for the benefit of the judgment creditors of his debtor; *Berrington v. Evans* (d). That was a stronger case than the present, inasmuch as the bill was there filed expressly on behalf of the plaintiff and all other the specialty creditors. This was not merely a formal averment, the omission of which could be dispensed with as immaterial. The omission of such a statement or averment from the bill in this case was of itself sufficient to distinguish it from the case of *Sterndale v. Hankinson*. It was impossible to say there was any privity between O'Kelly the plaintiff and O'Neill the judgment creditor, who came into the office under the decree. If the plaintiff had dismissed his bill, the second creditor could not have relied on the suit for the purpose of taking his demand out of the statute of limitations; and, up to the time of the decree, the plaintiff might have done what he pleased with the cause.* A creditor cannot rely upon a proceeding taken by another party; he must himself take some step or proceeding within the twenty years; *Smith v. Creagh* (e).

(a) 1 V. & B. 260.

(b) 16 Law Journ. Cases in Chan. p. 208.

(c) 1 Drur. & Walsh, 688.

(d) 1 Younge & Col. 434.

(e) Batty, 384.

* See acc. *Handford v. Storie*, 2 S. & S. 196; but see the observations of the Vice-Chancellor in *Sterndale v. Hankinson*, 1 Sim. pp. 396-9.

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WOULFE, C. B.

This case comes before the Court upon exceptions to the Remembrancer's report finding six years' interest only to be due on a judgment obtained in Trinity Term 1811. The exceptions have been taken upon the ground, that the Officer should have allowed the entire interest due on foot of the judgment, without any reference to the recent statute of limitations, or allowing the amount to be reduced by the operation of that act. The Officer, however, conceived that the judgment ought not to bear interest beyond six years, and that all interest beyond that period was barred by the 42d section of the 3 & 4 W. 4, c. 27.

The bill in this cause was filed on the 27th October 1832, by a person of the name of O'Kelly, a judgment creditor of John Bodkin, who died in 1831, having previously devised his estates to the defendant John Dominick Bodkin, his son, subject to his (the testator's) debts. The bill does not at the commencement contain the usual formal statement, that it was filed on behalf of the creditors in general, who should come in and contribute to the expenses of the suit, but it prays that an account of the debts of the testator should be taken, and that all other creditors might be paid in like manner as the plaintiff. A decree to account was pronounced on the 23d June 1835, by which the usual accounts of the debts, &c., of John Bodkin were directed; and it was in pursuance of that decree that the report was made, to which the exceptions have been taken. A judgment creditor takes advantage of this decree—comes into the office—proves his judgment, and claims to be entitled not only to the benefit of the decree to account, but also to the benefit of the suit as pending *ab initio*.

One ground upon which the exceptions were argued was, that a judgment debt did not properly come within the 42d section of the act of parliament, and much argument has been expended upon that question. The Master of the Rolls, in the case of *Kealy v. Bodkin* (a), has held that a judgment does not fall within that section, and this Court is now called on to come to a different conclusion. However, it is unnecessary to give any opinion upon the question, as there is another and different ground to take this case out of the statute of limitations, and upon which we are unanimous in thinking the exceptions ought to be allowed, and the creditor declared entitled to the full amount of the interest claimed by him. For my own part, I am unwilling to express any opinion upon the construction of the 42d section of the act in reference to the point in question, as I have not finally made up my mind upon the subject, notwithstanding the very able manner in which it has been dis-

(a) *Saunders & Scully*, 211; S. C. 5 Law Rec. 2 Ser. 241.

cussed on both sides. But I am of opinion, and I believe the rest of the Court concur with me, that the creditor coming in under the decree in this cause was entitled to the benefit of the suit, as fully and effectually as if he were the party who had filed the bill in the first instance. He adopted the suit—it became his—and it is, therefore, so far as he is concerned, to be considered as having been commenced before the period to which the statute applies, being pending at the time it was passed. The authority of *Sterndale v. Hankinson* (a) is that which must prevail on this point. That was a very well considered case, and the result of it is, that a creditor who comes in during the progress of a suit, which has been instituted by one creditor on behalf of himself and others, is to be considered in the light of a plaintiff in the cause, and as if the bill had been filed in his name. But that case has been met by the more recent decision of *Berrington v. Evans*, which came before the present Chief Baron of the Court of Exchequer in England. I think it, however, impossible to look into the last-mentioned case, without seeing that, instead of shaking the authority of *Sterndale v. Hankinson*, it rather corroborates it, and that the decision in *Berrington v. Evans* proceeded upon these special grounds, that the creditor did not come in until the greater portion of the funds had been distributed—and that he came in under circumstances which made it necessary for him to state that he was ignorant of the existence of the suit, and had not heard of it until recently; so that the very grounds laid by him in order to be admitted to prove his demand, excluded him from the benefit of the principle in *Sterndale v. Hankinson*. The principle of the latter decision is, that where a bill is filed by one creditor on behalf of himself and other creditors, and the others come in under the decree, it is reasonable to presume that they were lying by, seeing that there was a suit in progress in the course of which they would be enabled to come in and prove their demands; and it would be impolitic to lay down a rule which would make it necessary for each creditor to institute a separate suit, or commence a separate action for the recovery of his particular demand.

There exists, indeed, this distinction between the case of *Sterndale v. Hankinson* and the present, that in the latter the bill does not in terms profess to be filed on behalf of creditors; but that statement is, in my mind, merely matter of form. If the suit be so constructed as to admit of a creditor coming in under the decree and proving his demand, the want of such an averment cannot, as it appears to me, be sufficient to keep him out. I am therefore of opinion, upon the grounds I have mentioned, that the Officer ought to have considered the suit as pending in the name of the judgment creditor from the time the bill was filed,

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(a) 1 Sim. 393.



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and ought, consequently, to have allowed the greater amount of interest claimed.

Another topic discussed in the argument was the construction of John Bodkin's will, which, it was contended, created a trust for the payment of his debts; but upon that subject it is unnecessary for me to give an opinion, for the same reasons which have induced me to refrain from expressing one upon the construction of the act of parliament.

The exceptions ought, therefore, in my opinion, to be allowed.

PENNEFATHER, B.

I concur in the judgment of the Chief Baron, and in the grounds upon which he has put it. I think this is to be considered as the bill of the judgment creditor, and as filed in the year 1832; in other words, that he is to have all the benefit of the proceedings as effectually as if the bill had been filed by him in 1832. If that be so, it follows, that the bill having been filed, and the suit instituted, before the passing of the 3 & 4 of his late Majesty, it is not a proceeding falling within the provisions of that act of parliament. At law there have been more decisions than one to that effect (a).

I think the case of *Sterndale v. Hankinson*, before Sir Anthony Harte, to which the Chief Baron has referred, and which was decided in 1827, upon very full consideration, is an express authority on the point. Here the bill was filed in 1832—the decree pronounced in 1835—and a charge filed by the judgment creditor in 1836. There was then no unnecessary delay, nothing which could be taken as amounting to a waiver or abandonment of the proceedings on the part of the creditor—he took advantage of those proceedings in regular course—he required no liberty from the Court to do so; but the suit having been instituted in a manner which afforded him an opportunity of coming in, he was at perfect liberty to take advantage of that opportunity.—He did so, and, in my opinion, he must now be considered as having himself instituted the suit, which must, consequently, be deemed and taken to be his *ab initio*.

The decision of Sir Anthony Harte in *Sterndale v. Hankinson*, does not, in my mind, at all conflict with that of Lord Lyndhurst in *Berrington v. Evans*. In the latter case, it is true, the bill was filed expressly on behalf of creditors, but a final decree had been pronounced before the judgment creditor applied for liberty to prove his debt. By one of the rules of the Court of Exchequer in England, and which to a great extent we follow here, a creditor who applies to take advantage of the proceedings under the circumstances mentioned in that case, is bound to state his ignorance of the existence of those proceedings; and accordingly, the creditor applying in that case did state his ignorance of the existence of the suit; but the

(a) See *Padon v. Bartlett* cited *ante*.

Chief Baron was of opinion that he was not entitled in regard to the statute of limitations to the benefit of proceedings, of the very existence of which he was utterly ignorant, and which it might be said he had repudiated and disclaimed. Lord Lyndhurst distinguishes the case before him from that before Sir A. Harte in a way in which I entirely concur. There is, however, one expression of his Lordship to which, in particular, I wish to advert:—He observes—"The statute says that "such a claim shall not be made after twenty years, unless in the mean "time some part of the money, either principal or interest thereon, "shall have been paid, or some acknowledgment shall have been given "in writing. These are the only exceptions mentioned in the act. "Nothing is said of the case of a bill being filed by one creditor for the "benefit of the rest; and I cannot engraft another exception on the act "of parliament." Now, we are not engrafting any exception on the act of parliament. It has been ruled, and it cannot be contraverted, that if the bill be filed before the passing of the act, the act does not apply. If, then, we consider this as a creditor's bill, and as filed in 1832, we do not engraft another exception on the act of parliament; but we say that the bill, having been filed before the passing of the act, is, consequently, exempted from its operation. This is not a new exception falling within the act, but a case to which the act does not apply. I wish to say so much upon this part of the case, because I think that, consistently with the meaning and principle of the case before Sir Anthony Harte, it is impossible to say that this is engrafting another exception on the act of parliament.

Two other points have been made in the case. The will of John Bodkin has been relied upon as creating a trust capable of defeating the operation of the statute of limitations. It is not necessary to give any opinion upon this question; but I would observe, that circumstanced as the pleadings are, and considering the manner in which the charge and discharge have been constructed, it appears to me that the will is not found in such a way as to afford the creditor the benefit of it. But, as I have said, it is unnecessary to give any opinion upon this part of the case, my judgment being altogether founded on the reasons already assigned.

The last point was, that upon the true construction of the 42d section of the 3 & 4 W. 4, c. 27, the judgment creditor was disentitled to interest upon his judgment beyond six years. Upon the construction of that section I studiously avoid giving any opinion. It has already received the judicial interpretation of a Judge whose talents entitle his opinions to the greatest respect; and if we are called on to review any decision of his, it ought to be in a case which imperatively calls for it, and which may not to be decided upon other grounds.

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FOSTER, B.

Two questions have been raised in this case ; the first is, whether upon the true construction of the statute, 3 & 4 W. 4, c. 27, s. 42., more than six years' interest can be charged upon land in respect to a sum of money secured by judgment ?

The second question is, whether a judgment which has been proved in a suit, which suit was commenced before the passing of that statute, can be affected by its operation ?

Upon the second question the Barons are all agreed that the act does not apply to a judgment so circumstanced, and that, therefore, more than six years' interest may be recovered in the case now before the Court. The two cases which have been alluded to by my Brother PENNEFATHER necessarily lead us to this conclusion ;—one of them deciding that a suit instituted before the passing of this statute is not within its operation, and the other establishing that a person coming in to prove a judgment under a decree is to be considered as a *quasi* plaintiff in a suit. The judgment creditor in the present instance is so circumstanced, therefore his rights are unaffected by the statute. The present case may, therefore, be decided in reference solely to the second of the two questions which have been argued at the bar, and we might in consequence, perhaps, be excused for declining to express any opinion on the other and far more important question which has been argued, namely, whether more than six years' interest can be recovered out of land in respect of a sum of money secured by judgment ; but believing, as I do, that several reports remain suspended in our Chief Remembrancer's office until the views of the Court upon this important point shall be ascertained—and feeling, as I confess that I do, an impossibility of agreeing with the only judicial decision which as yet it has received, I feel it to be my duty to avow that such a difference of opinion does exist, and I do so, if for no other purpose, at least in order to suggest the desirability of having the subject reconsidered.

It appears to me that the effect of the 42d section of the statute 3 & 4 W. 4, c. 27, is to prevent land from becoming charged with an arrear of more than six years' interest upon any sum of money that is secured by judgment—and that the section was deliberately intended to have that effect. One of the principal objects of the statute was to relieve land from being affected by incumbrances under certain circumstances, under which, were it not for the operation of that act, it would, have been affected by them, and to narrow the periods of limitation already established, and to provide periods of limitation where none antecedently existed. With these views the act appears to me to have appropriated its 40th section, to define in what cases land should become exonerated by the lapse of time from the payment of the *principal* of a debt, and to have appropriated the 42d section to define in what cases land should

become exonerated from the payment of *interest*, and that the two sections must be viewed in connection with each other. The words of the 42d section are that "no arrears of interest in respect of any sum of money charged upon or payable out of any land, or any damages in respect of such arrears of interest shall be recovered by any distress, action or suit, but within six years after the same respectively shall have become due, or next after an acknowledgment of the same in writing." As this 42d section thus relates to the interest upon all sums of money charged upon land, our inquiry must, therefore, be, whether a sum of money secured by a judgment is a sum of money charged upon land?

It has been said that a judgment is not a lien upon land, but an incumbrance pending over it; but, however that may have been before this act of parliament, the statute appears to me to have expressly declared, that for the purpose of the statute at least, a judgment shall be taken to be one mode of charging a sum of money upon land. This is done by the 40th section, the words of which are as follows—"No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or *otherwise charged* upon or payable out of any land or rent." The expression "*otherwise charged*" necessarily implies that in the view of the act a mortgage is one mode of charge, and that a judgment is another mode of charge upon land. But if a judgment be one mode of charge under the 40th section, then it appears to me necessarily to follow under the 42d section, that no more than six years' interest can be recovered in respect of any sum of money so charged by judgment. The manner in which it has been sought to meet this view is, by saying that no interest is payable on a judgment, and that, therefore, it cannot be within the 42d section, which it is said can relate only to securities on which interest is payable. It has indeed been laid down by the high authority of the Master of the Rolls in the case of *Kealy v. Bodkin* (a), that the 42d section can apply only to cases in which interest may, according to the contract of the parties or the operation of law become due, and can be scarcely held to apply to a judgment on which neither at law or in equity does interest become due, although, in certain cases Courts of Law and Equity have enabled the creditor to recover compensation for the injury sustained by the vexatious proceedings of his debtor;—but with the most sincere respect, I avow myself unable to come to this conclusion. The 42d section, which is most carefully worded, says nothing of interest payable on the security, but of interest in respect of any sum of money charged upon land. There is no question about recovering interest on the security, but of recovering it in respect of the sum

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(a) Sausse & Scully 230; S. C., 5 Law Rec. 2 Ser. 241.

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charged upon the land; and the 40th section appears to me to have declared that a judgment is a mode of charging land; and the 42d section to have allowed that six years' arrears of interest may be recovered in respect of any sum of money charged upon lands, and that more than six years' interest shall not be recovered.

Now, therefore, granting that a judgment is a form of security which, viewed in its own nature, is not the subject-matter of interest—the sum which is secured by a judgment obtained upon confession still, unquestionably, does bear interest; and the only doubt in the case is, whethert his sum is to have six years' interest or more than six years' interest? No person has thought of contending that it is to have no interest. The framers of this act appear to me to have anticipated the very argument by which it is now sought to defeat their intentions, and to have used language skilfully and considerately in order to preclude those intentions from that argument—"No arrears of interest in respect of any sum of money charged," thereby getting rid of all consideration as to whether the security were of a nature to produce interest on its own account, and adopting in lieu of it the plain practical test of whether the security is the means of obtaining interest in respect to the sum of money charged;—now, this is exactly the office which the judgment performs. It is the means of procuring the interest for the judgment creditor "in respect of the sum charged;" and this is exactly the very thing which the 42d section says shall not be done except to the extent of an arrear of interest of six years.

RICHARDS, B.

If *Sterndale v. Hankinson* be good law, I am of opinion that the principle of that decision must govern the case now under consideration; but the soundness of that decision has been recognised and acted on for a considerable time, and I see no reason to dissent from it. In my opinion, therefore, it rules the present case. Two other questions were raised in the argument: one involving the doctrine of trusts, and referring to the will of John Bodkin. I am clearly of opinion that we have not the facts before us, nor the will sufficiently in issue, to justify us in coming to any conclusion on the subject. I therefore give no opinion upon it.

The next question was as to the construction of the 42d section of the late limitation act. Upon this question I must also decline to express any opinion; for although I think, with my Brother FOSTER, that it is very desirable that Judges should express their opinions upon the construction of new acts of parliament, and that the true meaning of such acts should be ascertained by frequent discussion; I, on the other hand, think that we ought only to express our opinions in cases which clearly call for such an expression of opinion, and which, not being

capable of being decided upon other grounds, may admit of revision by being made the subject of appeal. It is a question of vast importance, and one upon which I am unwilling to express any opinion, without having given it that due and deliberate consideration which it deserves.

Allow the exceptions, and declare the creditor entitled to the sums stated in the report for greater interest.*

* There was a like rule on the exceptions of other creditors who had excepted to the report on similar grounds.

Monday, February 3d.

**PRACTICE—APPOINTMENT OF NEW TRUSTEE UNDER
1 W. 4, c. 60, s. 22.**

WILLIAM CROOK and others, Minors, by GEORGE CROOK their Guardian and next Friend, Petitioners, v. TERENCE INGOLDSBY, Respondent.

The petition, which was under the 1 W. 4, c. 60, stated, that William Crook, late of Silver-hill, in the county of Fermanagh, gentleman, deceased, was in his lifetime and at the time of his death seized and possessed of part of the lands of Silver-hill, situate in the county of Fermanagh, under and by virtue of a lease for three lives with a covenant for perpetual renewal.

That the said William Crook departed this life in the year 1833, but before his death, duly made and published his last will and testament in writing bearing date the 23d day of August 1833, and executed by him in the presence of three credible subscribing witnesses, and that the testator thereby ordered his just debts to be paid; and subject thereto, devised and bequeathed the lands of Silver-hill aforesaid to the said George Crook, who was his nephew, and Terence Ingoldsby who was married to his niece, and the survivor of them, and the heirs and assigns of such survivor, together with all his the said testator's chattels and personal property, upon the trusts, and to and for the uses therein mentioned; that is to say, to raise thereout £50 which testator bequeathed to Mary Kitson to reimburse and pay her a debt due and owing by him; and in the next place in trust, either by sale or otherwise to dispose of, let, set, sell or mortgage said lands of Silver-hill; and the money arising from the same, as the case might be, testator gave, devised and bequeathed to petitioners, who were his grand-children. Of his said will testator appointed the said George Crook and Terence Ingoldsby, executors.

1840.

O'KELLY
v.
BODKIN.

Where A. was nominated trustee and executor of a will, upon a petition presented for his removal under 1 W. 4, c. 60, s. 22. stating that the will had been produced and shewn to A. and read by him previously to its having been executed by the testator in his lifetime; and that A. had thereupon approved thereof and consented to act as such trustee, but that subsequently to the testator's death he had declined to interfere in the trusts of the will,—the Court made an order for his removal, and referred it to the Remembrancer to approve of a proper person to be appointed trustee in his place.

1840.
CROOK
v.
INGOLDSBY.

The petition stated that William Crook died shortly after the making of his will, without altering or revoking the same, and that thereupon the said George Crook proved the will in the Diocesan Court of Clogher, and took upon himself the burden and execution thereof; the rights of the said Terence Ingoldsby having been thereby reserved.

The petition further stated that the will was produced and shewn to the said Terence Ingoldsby and read by him previously to its having been executed by the said William Crook in his lifetime, and that thereupon the said Terence Ingoldsby approved thereof, and did not make any objection whatever to act in the premises as such trustee.

The petitioners charged that if Ingoldsby had then made any objection to undertake the trusts, the testator would have appointed another trustee in his place. It was further stated that testator's chattels and personal property were very inconsiderable, and inadequate to pay his just debts; and that some of his creditors having lately become pressing for their demands, and having threatened to file a creditor's bill, the said George Crook in order to avoid the expense thereof, and for the purpose of paying off said debts and preserving the surplus fund that might arise from the sale of said lands, advertised the same with the knowledge of the said Ingoldsby, to be sold by public auction in the town of Enniskillen, on the 3d day of April last. That thereupon Hugh Henderson of Enniskillen became the purchaser thereof for the sum of £700, and that the title to the said lands having been investigated and approved of, the said Terence Ingoldsby was called upon to execute the deed of sale to Henderson, the purchaser, but that he declared he would not execute any deed of sale to the purchaser of said lands, and would not further interfere therein, or act in the trusts of said will, and that he still persisted in such refusal. That the said Terence Ingoldsby having so refused to act in the trusts of said will, or to execute said deed, raised considerable embarrassments as to petitioners, the creditors' debts bearing interest, and the fund to pay the same not being fructifying.

Petitioners, therefore, prayed that the Court might remove the said Terence Ingoldsby from the trusts of said will, and refer it to the Chief or Second Remembrancer to inquire and report a fit and proper person to act in the premises as trustee in his place.

The matter of the petition (which was verified by the affidavit of the said George Crook) was moved by Mr. *James Shiel* on the 4th of December 1839, before Baron RICHARDS, upon which occasion his Lordship made an order that the matter of the petition should be again moved on the second Saturday in the next term, a copy of the petition and of the order being served on the respondent a fortnight before that day.

Monday, February 3d.

1840.
CROOK
v.
INGOLDSBY.

Mr. *Shiel* on this day again moved the matter of the petition, and stated, that copies of the petition and order of the 4th of December had been served on the respondent personally on the 3d January last, and that an affidavit of such service had been filed.

The facts stated in the petition are not contraverted by the respondent, nor does he appear to oppose the present application. The only question is, whether this is a case within the 22d section of the 1 *W.* 4, c. 60? No case can be found exactly similar; but that which comes nearest to this is a case before the present Master of the Rolls, *In re Legg (a)*. It must be admitted, however, that there is a distinction between that case and the present, the one cited being the case of an heir-at-law of a surviving trustee resident out of the jurisdiction. The Master of the Rolls, moreover, in another case refused to appoint a new trustee in the place of a person who it appeared had never accepted the trust and had refused to act; *Mitchell v. Nixon (b)*.—[PENNEFATHER, B. The Master of the Rolls in that case appears to have followed the decision of this Court in an earlier case, in which we held that a person who had repudiated the trust was not a trustee within the meaning of the act.*]—But here we say there has been an express acceptance of the trust by one trustee, and at least an acquiescence or assent on the part of the other. The minors will be involved in certain ruin if it be necessary to file a bill.

WOLFE, C. B.

The Court conceives it may accede to the prayer of this petition, without creating a conflict of authority between the present and any previous decision. Therefore,

Refer it to the Chief or Second Remembrancer to approve of a proper person to be appointed trustee of the trusts in the petition mentioned, in the room of the respondent Terence Ingoldsby; and to approve of a proper draft of an assignment of such trusts to be executed to the person to be so approved of as trustee in the room of said T. Ingoldsby. And let said T. Ingoldsby execute the deed of assignment so to be approved of; and, thereupon, let the said T. Ingoldsby be removed from being trustee of the trusts in the petition mentioned.†

(a) 1 Ir. Eq. Rep. 374.

(b) Id. 155.

* See *In re Quinlan & Wife*, 1 Jones, 549; and *In re Greene*, 3 Law Rec. 2 Ser. 229.

† See *West v. West*, 4 Law Rec., O. Ser. 150; *In re Housford*, 1 Jones, 550; *Johnston v. Anketell*, 5 Law Rec., 2 Ser. 201; *In re Earl of Mayo*, 3 Law Rec., 2 Ser., 224; S. C. 1 Lloyd & G. (temp. Plunket), 118.

Thursday, January 23d.

**PRACTICE—ADMISSION OF ATTORNEY—PERIOD OF
APPRENTICESHIP—STAMP DUTY.**

Ex-parte WILLIAM STERNE.

As a general rule, from which there will be no deviation, unless under peculiar circumstances, the Court in computing the period of apprenticeship to an attorney, will not allow credit for time elapsed before the payment of the stamp duty upon the indentures.

Mr. FITZGIBBON moved that William Sterne be admitted an attorney.

On the 11th of April 1835, the applicant presented the usual petition, and made the necessary affidavit, preparatory to his being bound apprentice to an attorney, and on the same day entered into the office of his intended master, Mr. C. G. Smyth. His indentures, however, were not executed until the 5th of May following, on the 7th of which month they were duly enrolled.

Mr. *Fitzgibbon*.—After the termination of the present Term, Mr. Sterne will have served twenty clear Terms, including Easter 1835. Although his indentures were not executed until towards the close of that Term, it is sworn that he entered into the office some days previously to its commencement, and continued diligently to serve his intended master while his indentures were in preparation. The Law Society has been served with notice of this application, but they do not oppose it. For the motion was cited *In re O'Brien (a)*.

RICHARDS, B.—That was a very different case, as it was understood by the Court at the time they granted the application, that the party only got credit for an intermediate Term which he had lost after the stamp duty had been paid.

PENNEFATHER, B.—There was a fatality in that case; there is none in this. If we were to grant the present application, it would come to this—that provided the stamp duty be paid at any time within the Term, even though it be on the very last day, that Term must be reckoned; but such is not our practice, as we do not give credit for time prior to the payment of the stamp duty, unless it be under very peculiar circumstances.

The CHIEF BARON and Baron FOSTER concurred.

No rule.

(a) 1 Ir. Law Rep. 480.

NOTE.—The REPORTER regrets, that in consequence of the space allowed to the Exchequer Reports having been necessarily restricted by the arrangements made for bringing this volume to a close, he has been obliged to omit some cases of Hilary and Easter Terms, which were prepared for publication.

CHANCERY.

Thursday, June 18th, and Friday, June 19th.

ASSIGNMENT OF *CHOSE IN ACTION*—CHAMPERTY—RIGHT OF
ASSIGNEE TO INQUIRY OF WILFUL DEFAULT OF
EXECUTOR.

SCULLY v. DELANY.

THIS was a re-hearing.—A question arose when the cause was called on, as to the right to begin, and

Mr. *Warren*, Q. C., for the plaintiffs, contended that when the re-hearing was general, as in the present case, the plaintiff was entitled to begin, and cited *Uniacke v. Giles* (a).

LORD CHANCELLOR.—Where the re-hearing is confined to a particular point, the party complaining of the decree in that point ought to begin; but when the whole case is to be gone into, the case is to be considered as if this was the first hearing, and the plaintiff has a right to open the case.

Mr. *Pennefather*, Q. C., for the defendant, admitted that the re-hearing was general, and

Mr. *Warren*, for the plaintiff, proceeded with his statement. The facts of the case are so fully stated in Mr. *Haig's* report of the case when at hearing originally,* that it is unnecessary to repeat them here. The question principally discussed at the re-hearing was, as to the right of the parties claiming under the settlement of 1822, as assignees of Francis O'Ryan the elder, to have a direction respecting the sums alleged to have been lost by the wilful default of the executor William Delany.

Mr. *Warren*, Q. C., Mr. *W. Brooke*, Q. C., Mr. *O'Brien*, and Mr. *Loughnan*, for the plaintiffs.

By the settlement of 1822, Francis O'Ryan the elder conveys his moiety of the residuary estate of Edmond Scully, the testator, to the trustees, and that of course conveys all the accessaries to that residue. The right to the inquiry as to wilful default was one which subsisted

A party entitled to a moiety of the residue of a testator's personal property, assigns that moiety—*Held*, that the assignee was entitled to institute a suit against the executor for an account of what had been lost by his wilful default, and that such suit was not liable to the objection of champerty.

(a) 2 Mol. 258.

* *Ante*, 165.

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in the settlor at the time of the execution of the deed, and the assignment of any thing which necessarily carries with it the right to institute a suit is not champerty. In *Williams v. Protheroe* (a), an agreement between the vendor and purchaser of an estate, that the latter bearing the expense of certain suits which had been commenced by the former against an occupier for by-gone rent, should have the rent so recovered, and also any sum to be recovered for dilapidations, and that the purchaser should be at liberty to use the name of the vendor in any action, was held not to be champerty. In *Moore v. Creed* (b), where the agreement between the parties was held to amount to champerty, there was an agreement for the division of the subject-matter of a suit actually in existence, and there was nothing assigned but the subject of the suit, and there was besides a stipulation as to one of the parties advancing the necessary sums for the carrying on of the suit. That was undoubtedly a clear case of champerty, but differs from the present in most important particulars; there was no suit in existence in the present case, when this assignment had been executed, as there was in *Moore v. Creed*, and it did not follow necessarily from this assignment that it would ever have occasioned a suit. The account between the assignee and the executor might have been settled without the interposition of a Court of Equity. The true rule in such a case is that laid down by Lord Abinger in the case of *Prosser v. Edmonds* (c), where he draws the distinction between the assignment of a mere right to file a bill in equity (as in that case for a fraud committed upon the party assigning) and an assignment of an interest actually vested in the party assigning, such as an equity of redemption, or, as in the present case, of a share of the testator's residuary estate. The former case falls within the mischief sought to be guarded against by the rule against champerty, namely, the promotion of litigation, while any restriction upon transactions of the latter class would be an undue interference with the rights of property. The distinction drawn by Sir J. Leach, M. R., in the case of *Harrington v. Long* (d),—and his decision in that case was affirmed by Lord Brougham upon appeal (e)—is between an assignment of the subject-matter of a suit, the validity of which he admits, and an agreement to give a party the benefit of a suit upon condition that he prosecutes it. The objection relied on in that case was, that the agreement amounted to maintenance, but the principle is equally applicable to a case like the present, where the defence set up is champerty.

() 3 Yo. & Jer. 129.

(b) 1 Dr. & W. 521.

(c) 1 Y. & C. 481.

(d) 2 My. & Ke. 590.

(e) 2 My. & Ke. 599.

Mr. Pennefather; Q. C., Mr. Blackburne, Q. C., and Mr. D. Sherlock, for the defendant.

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Our principal ground of objection to the decree is the direction contained in it respecting wilful default. In this record the Court could not give such a direction. The plaintiffs claim under the deed of 1822 as assignees of Francis O'Ryan, and their rights are to be considered as if Francis, enumerating the particulars of which the residue consisted, had assigned the same specifically. We contend that the right to file this bill was not assignable. It must be conceded for the purposes of this argument, that the defendant Delany was in default in not having entered judgment upon the bonds. The liability of an executor for wilful default is not a "*chose in action*:" it is not a right growing out of any contract; it arises merely from the doctrines of Courts of Equity compelling an executor to make good the loss occasioned by his default; and the question is, whether the right to file a bill for that purpose passes as incident to the assignment of the personalty? Suppose a renewable leasehold vested in an executor who neglects to renew, would the assignee of the original lease have a right to file a bill against the executor to make good the loss occasioned by his neglect? None of the cases cited on the other side are applicable. *Williams v. Protheroe*, was a case of an actual contract for the purchase of an estate, and the subject-matter of the suit was part of the produce of the estate so purchased. The case of *Prosser v. Edmonds* is precisely applicable, and the principles laid down by Lord Abinger, we contend, govern the present case. The subject-matter assigned here, namely, the sums lost by the wilful default of Delany, could not have been made available to the assignee except through the medium of this Court. It was in fact an assignment of a right to file a bill, and comes within the rule laid down by Lord Abinger.

Mr. O'Brien, in reply.—There is one circumstance in this case which should induce the Court, if necessary, to look favorably on the right claimed by the plaintiff, namely, that it is a right springing out of a family settlement, for family purposes. In the case of *Molony v. L'Estrange (a)*, Sir A. Harte draws a distinction between such a case and that of an ordinary conveyance or assignment. In his judgment in that case, p. 413, of Mr. Beatty's Report, he says, speaking of a case in which relief had been refused to a purchaser who sought to get rid of an incumbrance subsequent to which he had purchased, "If the title of *L'Estrange* in this case had arisen from a mere purchase between the vendor and vendee in the usual way, I should act on the principle of the case I have alluded to; but the right springs out of a family settlement for family purposes. And I think there is sufficient privity

(a) 1 Beat. 406.

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between the grantor of the annuity and the present possessor, to entitle him to the assistance of the Court to disencumber the estate."

LORD CHANCELLOR.

As to the point which has been relied on in the course of this re-hearing, that there is no right in the plaintiffs here to recover from the executor the amount of the sums lost by his wilful default, it appears to me so clear, upon the ordinary principles of a Court of Equity, that I am afraid I have not been able to understand the full force of the arguments of the defendant's counsel. It is not disputed that the plaintiffs are entitled to a general account of the personal property of the testator from the executor, but their right to any direction as to wilful default is disputed. It is said that right rests merely in action and is not capable of being assigned, and the argument would be unanswerable if the right rested merely on the assignment. I agree that a mere right to sue cannot be transferred, and if that were the case here, the plaintiffs could not succeed in obtaining the direction as to wilful default. But that is not the case; the right transferred is a right to a proportion of the assets of the testator, and if that right have been transferred, the right to all inquiries incidental to the principal right goes along with it. If the assignment were used as a mere pretext to cover a different purpose, and instead of being a transfer of the property were merely a transfer of a right of suit in respect of that property, such an assignment would be void. But in every case of *bona fide* transfer of property (for I will not confine it to family settlements as in the case before Sir Anthony Harte, who no doubt spoke merely with reference to the facts of the particular case then before him), but in every such case of a *bona fide* transfer of property, the right to sue in respect of that property passes as incidental to that transfer. It is every day's practice in bankruptcy to have all the bankrupt's rights sold; and there it is not doubted that the purchaser can use all remedies for enforcing the recovery of those rights which were vested in the bankrupt and his assignee. As to the other points which have been argued, I have no difficulty in affirming the original decree upon all, but at present I shall say nothing as to costs. In general, re-hearings are desirable both for the suitors and for the Court, and I am not disposed to visit upon the party seeking a re-hearing the costs, unless it has been done for vexation or delay. I shall therefore let the costs of this re-hearing be costs in the cause.

Original decree affirmed.

Monday, June 8th, and Tuesday, June 9th.

POWER TO APPOINT AMONG CHILDREN—EFFECT OF ADVANCEMENT BY PARENT—COVENANT TO TRANSFER FUND AMOUNTING TO ACTUAL TRANSFER—EXCEPTION TO MASTER'S REPORT—EFFECTS OF UPON RE-HEARING—PRACTICE.

BROWNLOW v. Earl of MEATH.

By indentures of lease and release, the latter bearing date the 7th of July 1790, being the settlement executed previously to and in contemplation of the marriage of Maurice Bagenal St. Leger Keatinge with the Lady Martha Brabazon, the estates of Keatinge were settled to the use of him for life, with remainder to trustees for two terms of 99 and 500 years, to secure a jointure for Lady Martha, and to raise portions for younger children, and subject to the use of the first and other sons of the marriage, according to priority of birth, in tail male; and in default of issue male, to the use of Keatinge, the settlor in fee. The trusts of the term of 500 years were declared to be to raise £6000, in case there should be no issue male of the marriage and two or more daughters (events which afterwards took place), for the portions of such daughters, to be divided among them in such shares and proportions, and to be paid at such times as the settlor Keatinge, by any writing under his hand, attested by two or more credible witnesses, or by his last will, attested by a like number of witnesses, should appoint. By the same deed it was provided, that "If the said M. B. St. Leger Keatinge should advance and prefer any younger child or children, daughter or daughters, in marriage or otherwise, with a portion or portions in his lifetime, then and in such case such portion and portions should be accounted as part, if less in nature than the portion and portions thereinbefore provided or intended to be provided for such younger child or children, daughter or daughters; but if as much or more in value, then in full of the same portion or portions, unless he the said M. B. St. Leger Keatinge should, by writing under his hand, declare the contrary." There was issue of the marriage several daughters, but no son.

In the year 1813, there being then no probability of any male issue of the marriage, Keatinge entered into a contract with Robert Latouche for the sale to him of the estates comprised in the settlement of 1790, for the price of £93,000; and in order to protect the purchaser from the effect of the limitations in favor of issue male contained in

Where a power is given to appoint a fund among children as the parent shall direct, and one of the children is advanced by the parent, out of his own funds, a portion equivalent to the share which such child would have taken in the settled fund, if no appointment had been made, the effect of it is to increase the shares of the other children, and not to make the advanced child's share part of the parent's assets.

Where a father being entitled to a sum of money on mortgage, covenanted on the marriage of his daughter, that a certain specified part of it should be transferred to the trustees of the marriage settlement within three months after his death, and covenanted to pay interest in

the mean time, such covenant was held to amount to an actual assignment.

Where a party who has had an opportunity of excepting to the Master's report, presents a petition of re-hearing, praying that the decree may be reversed, he cannot object to the decree on the grounds appearing upon the report.

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the settlement of 1790, it was agreed that £71,000, part of the purchase-money, should remain a charge on the lands, bearing interest; and accordingly, by indentures of lease and release, the latter bearing date the 2d of March 1813, reciting the agreement for the purchase, and that it had been agreed that £71,000 should remain a charge upon the lands, and that the residue of the purchase-money, £22,000, should be paid to Keatinge, to be applied by him in the payment of certain specified incumbrances affecting the lands agreed to be sold, which, when paid, were to be assigned and kept on foot in trust for the purchaser, and reciting, that by deed of same date the lands had been conveyed to the purchaser—he by that deed conveyed them to the Earl of Meath and John Latouche, upon trust, in the event of there being issue male of the marriage, to raise and pay to the purchaser all sums of money then paid or thereafter to be paid by the purchaser, to or for the use of Keatinge, or in discharge of any incumbrance affecting the lands; and in the event of there being no issue male on or before the month of November 1820, or in the event of the death of Keatinge or Lady Martha before that, to raise the sum of £71,000, with interest.

Lady Martha Keatinge died in the year 1820, leaving issue three daughters, the only issue of the marriage, namely, Elizabeth, Selina Charlotte, and Isabella. In the year 1821 Elizabeth married the defendant Claude Alexander, and by indenture of the 14th of July 1821, executed on the occasion of that marriage, Keatinge assigned £20,000, part of the unpaid purchase-money, as a portion for his daughter, to trustees, for her and her husband, and the issue of the marriage; such sum of £20,000, however, not to be paid until his death.

In the year 1826, Selina Charlotte married the defendant, the Hon. Ferdinand St. John; and on the occasion of that marriage, by indenture bearing date the 7th of November 1826, “in order that the sum “of £20,000, late Irish currency, should be secured to and vested in the “trustees of the marriage settlement after the decease of the said M. B. “St. Leger Keatinge,” he covenanted with the trustees of the settlement, and with the Hon. F. St. John, “That he the said M. B. St. Leger “Keatinge should and would direct and appoint, or otherwise assure that “the said sum of £20,000 Irish, part of his the said M. Keatinge’s personal “estate and property, should, within three months after his decease, “be transferred to and vested in them the said trustees,” to be held by them upon the trusts of the settlement. Keatinge, by his will dated the 5th of April 1831, reciting the indenture of the 7th November 1826, in performance of his covenant contained in said indenture, directed that so much money of the said United Kingdom as should be equivalent to £20,000 Irish, should be paid out of the money due to him on the security of the deed of the 2d March 1813; and if that should be insufficient, then out of his residuary personal estate, to the

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trustees of the settlement, within three calendar months after his decease. He also bequeathed as much money as should be equivalent to £20,000 Irish, to the plaintiffs Claude Alexander and the Rev. Francis Brownlow, who were also his executors, upon trust, to pay the interest thereof to his daughter the defendant Isabella Keatinge, for her separate use, during her life, and, after her decease, to pay the interest to any husband she might marry, for his life; and after the decease of the survivor, upon certain trusts, for the issue of any such marriage.

Keatinge died in the year 1835, without having altered or revoked his said will, which was proved by the plaintiffs Claude Alexander and the Rev. F. Brownlow. The assets of the testator were insufficient for the payment of his debts and of the legacies given by his will, including the bequest of £20,000 to the defendant Isabella Keatinge, and the bill was filed by the executors for the administration of the assets.

The defendant Isabella Keatinge, by her answer, claimed to be entitled to the £6000 provided for the daughters of the testator by the settlement of 1790, as her sisters had been otherwise provided for by the testator.

On the 10th of November 1836, a decree was pronounced, referring it to the Master to take an account of the real and personal estate of the testator, and of his debts, legacies, funeral and testamentary expenses; and also to inquire and report the rights of the respective parties under the will of the testator, and the several deeds of the 7th July 1790, 2d March 1813, 14th July 1821, and 17th November 1826, and their several priorities.

The Master, by his report, found that at the death of the testator there was due on foot of the deed of 2d of March 1813, £41,790. 9s. 3d. British, which the testator by his will specially bequeathed for the purposes therein mentioned; and that the defendants Elisabeth Alexander and Selina Charlotte St. John were precluded by the provisions made for them upon their marriages, from claiming any part of the £6000. As to Isabella Keatinge, the report contained a special finding, that in case the Court should be of opinion that she was entitled only to one-third share of the £6000, that there was then due to her £2123. 1s. 6d. of the present currency; and in case the Court should be of opinion that she was entitled to the entire, then that there was due to her £6389. 4s. 8d. present currency; and submitted to the Court, whether, in either case, she was bound to elect between the bequest in the testator's will and the benefits provided for her by the settlement of 1790. The report also found that the £20,000 Irish, which the testator covenanted to pay to the trustees of Mrs. St. John's marriage settlement was next in priority after the £20,000 due on foot of the deed of the 14th of July 1821, which it found to be the first charge on the purchase-money which remained unpaid; and that a

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judgment confessed by the testator to Benjamin Bowen Johnson, solicitor, on which there was due £592. 7s. 8d., was chargeable on the assets of the testator, next in priority to the aforesaid demands.

The cause came on to be heard on the report and merits on the 8th and 11th days of June 1838, when a final decree was pronounced, by which the special point in the Master's report was ruled in favor of the defendant Isabella Keatinge; and it was declared that she was entitled to the entire sum provided for the daughters by the settlement of 1790; and she electing to take it in lieu of the provisions made for her by the will, the same was directed to be paid to her out of the unpaid purchase-money in the first instance: and the other reported specialty creditors were decreed entitled to be paid their respective demands reported due to them, according to the priority of their respective securities, out of the residue of said fund, and the produce of the other real and personal estate of the testator.

At the original hearing, no counsel appeared for Benjamin Bowen Johnson, as he was at that time under the impression that he had a lien for the amount of his debt upon certain title-deeds which had been deposited with him as the solicitor of the testator. On the 3d of February 1840, however, he was served with a notice of motion to bring in the deeds; and upon that motion, the Master of the Rolls decided, that he, by taking from the testator the bond upon which the judgment had been entered, had waived his lien for costs.* The assets of the testator proved to be insufficient for the payment of the debt reported prior to Johnson's; and he presented a petition of re-hearing, complaining of the decree as erroneous, in declaring Isabella Keatinge entitled to the entire of the £6000; and also in declaring that the £20,000 Irish, reported due to the trustees of Mrs. St. John's marriage settlement should be paid in priority to the petitioner's demand.

Mr. *Blackburne*, Q. C., Mr. *Warren*, Q. C., and Mr. *Hartstronge Robinson*, for the petitioner.

The effect of the advancement by the testator of his daughters Elizabeth and Selina, was to make him a purchaser of their shares of the £6000, which therefore constitute part of his assets. In *Pitt v. Jackson* (a), a sum of £20,000 directed to be laid out in land, had been settled upon marriage to the use of the husband for life; remainder to the wife for life, remainder in default of appointment by either husband or wife, among the children equally. There were issue of the marriage

(a) 2 Bro. Ch. Cas. 51.

* See the case of *Brownlow v. Keatinge*, *ante*, n. 243, where this motion is reported.

several children, who all died under age, with the exception of Mary, who married the defendant Smith, and Anne, who married Lord Camelford. The husband by his will appointed the fund equally between the two daughters, and gave £30,000 as a legacy to his daughter Anne. Upon the marriage of Anne subsequently with Lord Camelford, he gave her a portion of £40,000, and by a codicil reciting the will, the marriage of Anne, and the payment of the portion, he revoked the legacy of £40,000 given to her; and the fourth question in the case was, whether the codicil was a revocation of the £10,000 as well as of the £30,000; and it was conceded by the counsel for Lord and Lady Camelford, that the revocation extended to the £10,000, as the husband had become a purchaser of that moiety by the fortune given to Lady Camelford. The same case came before Lord Rosslyn, under the name of *Smith v. Lord Camelford* (a); and he, in his judgment in that case (b), recognizes the doctrine of Lord Kenyon, holding that the advancement by the father was a purchase of all that Lady Camelford could claim absolutely, in default of appointment. For the purposes of the petitioner here, it is immaterial whether the father was entitled as a purchaser, or whether the fund is discharged from the claims of the children; in either case the fund would form part of his general assets. It is true that the case of *Folkes v. Western* (c), is opposed to the doctrine here contended for. In that case a sum of £8000 had been provided for the daughters of the marriage, to be divided among them as the husband and wife should jointly appoint, and in default of appointment, as the survivor should appoint; and it was declared that if the husband should in his lifetime advance any portion for any daughter in marriage, unless he should in writing declare it not to be for or towards her portion, such daughter should, after the decease of the survivor of the husband and wife, have only so much as with the portion advanced would make up the portion provided for her by the articles. There were issue of the marriage two daughters Elizabeth and Frances; and on the marriage of Elizabeth a sum of £10,000 was covenanted to be paid, which it was declared should be deemed a satisfaction of all such claims as she had or was entitled to out of the £8000 secured by the settlement: and it was held by Sir W. Grant, M. R., that the effect of the advancement of the one daughter was to increase the share of the other, and that it was not a purchase by the father. But that decision of Sir W. Grant was opposed to the doctrine both of Lord Kenyon and Lord Rosslyn; and in his judgment he proceeds upon the ground that the interest of the daughter advanced was merely contingent, and that no intention was declared that the father should become a purchaser of Mrs. Lloyd's share.

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(a) 2 Ves. jun. 698.

(b) Ib. 713.

(c) 8 Ves. 456.

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[LORD CHANCELLOR.—Sir W. Grant probably decided the case upon the ground of intention, and in ascertaining that intention it was a material circumstance that the share of the fund which was to go to the daughters was unascertained; for it is much more improbable that the parties should enter into a contract respecting an unascertained sum, than if the sum had been ascertained.]

It is upon that ground that Sir John Leach rests Sir Wm. Grant's decision, when commenting upon it in the case of *Noel v. Lord Walsingham* (a). So far as the decision in *Folkes v. Western* rests upon any other ground, it is opposed to the decision in *Noel v. Walsingham*. In the latter case, by the terms of the settlement under which the portions had been provided for the children, it was stipulated that any advance made by the father in his lifetime was to be taken in satisfaction of the portion provided by the settlement, unless the father should declare the contrary; and Sir J. Leach held the true construction of that provision to be, that if the father made an advance to an object of the settlement, without any declaration of intention in respect to it, the advance operated to the exoneration of the estate charged with the portion, but that the father was at liberty to declare, that notwithstanding the child was to receive its full portion, or was at liberty to consider himself *pro tanto* as a purchaser of the portion. It is admitted here, that there is an absence of intention as to any purchase of the shares of the daughters advanced. The intention of the testator was to make an equal provision for Isabella with that already made for her sisters; but that makes for us, for this provision which he makes for her is £20,000, and not £14,000, as it ought to have been if he intended that she should have the £6000 provided by the settlement. We do not require any declaration of intention, because the remainder in fee, in the events which have happened, vested in the testator. The Court ought not to presume that the testator intended to give his daughter three times the sum provided for her by the settlement, but rather that he intended to make it part of the fund for payment of his creditors. As to the second question, we have at least a right to stand in equal rank with the trustees under the settlement of 1826. It is true that in this Court a covenant has been frequently held to create a lien upon the subject of the covenant, but in all those cases the subject-matter of the covenant had been ascertained at the time when it was entered into. In the case of *Lyster v. Burroughs* (b), a general covenant was held to create a lien on after acquired real estate; but that differs from the present in this most important particular, that the covenant here extends to general personal estates, and would be satisfied by any other

(a) 2 Sim. & Stu. 99.

(b) 1 D. & W. 149.

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means than the transfer of this particular fund. The deed of 1821 contains an express grant, and not a mere covenant, and your Lordship's judgment in *Lyster v. Burroughs* (a) rested principally upon there being express words of charge in the deed, which was held to create the lien. The deed of 1826 contains a mere covenant. The difference between the two deeds in that respect shews a different intention on the part of the settlor. It is true the Master's report, which has not been excepted to, in consequence of the petitioner's belief in the existence of his lien, finds this to be the first charge on the fund after the deed of 1821. But we are now as if at an original hearing without an exception; and where error appears on the face of the report no exception is necessary; *Adams v. Clanton* (b); *Brodie v. Barry* (c).

Mr. Smith, Q. C., Mr. Collins, Q. C., and Mr. Robert George Moore, for the defendant Isabella Keatinge.

The general proposition which we contend for is, that if the provision made for the children in the parents' lifetime is equal to the share which they would take in default of appointment, the advance is *prima facie*, to be taken as an exoneration of the fund, without any declaration of intention on the part of the parent; and that it requires a declaration of intention to the contrary to deprive it of that effect. Mere absence of intention is not sufficient to make the advanced child's share of the fund part of the general assets of the testator. In *Pitt v. Jackson* (d), the point was not made the subject of discussion. In *Folkes v. Western* (e), there was no declared intention one way or the other; and the effect of Sir W. Grant's decision in that case is, that if any one of the objects of the power were removed by advancement, it is the same as if that object had been removed by death. Before the decision in *Noel v. Walsingham* (f), *Folkes v. Western* had been made the subject of discussion by Sir E. Sugden in his work on *Powers* (g). He disapproved of Sir W. Grant's decision, and although he argued in support of his own view in *Noel v. Walsingham*, he failed in convincing Sir J. Leach, who expressly says in his judgment in the latter case—"That he does not agree with the proposition, that there is error in the decree in *Folkes v. Western*." The settlement in *Noel v. Walsingham* was *totidem verbis* with the settlement in the present case. The principle both of Sir W. Grant and of Sir J. Leach is, that in the absence of intention the advance is to be taken as made for the benefit of the other children. Neither in the settlement of 1821, nor in that of 1826, is there any thing to shew an intention on the part of the father to become the

(a) *Ante*.

(b) 5 Ves. 225.

(c) 1 Jac. & Wal. 471.

(d) *Ante*.

(e) *Ante*.

(f) *Ante*.

(g) 2 Sug. Powers, 226.

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purchaser of any part of the fund, or to do any thing but exonerate it. There is the same absence of intention in his will, and it lies upon creditors claiming this fund as part of the assets of the testator, to shew some declaration of intention. In transactions of this nature three questions may be raised—first, whether it was the intention of the settlor to make the advanced child's share part of his personalty?—Second, whether the effect was to give the rest of the fund to the other objects?—Third, whether the estate is exonerated? Now here the testator could not intend to exonerate the estate, which was then the property of Latoucha. The power must be exhausted among the objects of it: that is the doctrine laid down by Lord Rosslyn in his judgment in *Smith v. Lord Camelford (a)*, and acted upon by your Lordship in the case of *Hynes v. Redington (b)*.

Mr. Serjeant *Moore*, and Mr. *Berwick*, Q. C., for the defendants, the Honorable Ferdinand St. John, and Selina his wife.

The Master's Report finds that we stand next in priority to the deed of 1821; and it is not open to the petitioner now to quarrel with that finding—his petition prays that the decree may be reversed, and not that the report may be varied; but even if it were, the Master's finding is perfectly correct. The deed of 1826 recites the intention to transfer £20,000, part of the personal estate and property of Keatinge, to the trustees within three months after his death; and to pay interest to the trustees until the money was to come into possession; and then "to the intent that the said sum of £20,000 should be secured to the trustees;" Keatinge covenants with them that the same shall be transferred within three months after his death. The trusts of the fund are in strict settlement with an ultimate trust for the next of kin of Selina; and the deed contains the usual provision that when the securities upon which the said sum of £20,000 shall be invested shall be paid off, that the trustees shall invest it in other securities. The Earl of Meath, who was one of the trustees of that deed, was also a trustee of the mortgage money under the deed of 1813. All the authorities upon this subject are collected in the case of *Lyster v. Burroughs (c)*; and the old decisions will be found in the case of *Townsend v. Windham (d)*, where it was held by Lord Hardwicke that a covenant may amount in equity to an assignment of personal property.

Mr. *Pennefuther*, Q. C., Mr. *Scott*, Q. C., and Mr. *Hawkins*, for the plaintiffs, the executors of Keatinge.

Mr. *H. Robinson*, in reply.

(a) 2 Ves. jun. 713.

(c) *Ante*.

(b) Ll. & G. temp. Phelket, 81.

(d) 2 Ves. jun. 1.

The LORD CHANCELLOR.

There are two distinct questions in this cause, which have been made the subject of discussion—one, whether the covenant on the part of Colonel Keatinge in the deed of 1826 to transfer £20,000 to the trustees of that deed, amounted to an actual assignment of so much of the money remaining due on foot of the deed of 1819—and the other, whether the effect of the advancement of the two married daughters is to exonerate the fund provided by the settlement of 1790 from their claims, and render the entire of it available for the daughter who has not been otherwise provided for; or whether the effect of those advancements was not to constitute two-thirds of that fund, part of the assets of the testator, and thereby subject it to the payment of the debt due to the petitioner. With respect to the first of those questions, I do not think it is now open to the petitioner, who proved his debt in the office, and had an opportunity of excepting to the Master's report, had he chosen to avail himself of it. But even if it were, I am strongly disposed to think that this covenant amounts to an actual assignment of the particular fund in question. In this respect, the passage from the testator's will is important as shewing his intention, and he had a right to say by his will, that as I have by deed covenanted to do a particular thing, I do hereby do it. With respect to the other question, I shall look into the authorities before I decide it.

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Thursday, June 25th.

LORD CHANCELLOR.

This is a re-hearing by Mr. Johnson, a bond creditor of the testator; and two questions are raised for the consideration of the Court; the first, whether the defendant Isabella Keatinge, in the events that have happened, is to be considered as entitled to the entire of a sum of £6000 (charged for younger children on the marriage of her father Colonel Keatinge), or only to £2000; and the second, whether the petitioner is not, at least, entitled to be paid, *pari passu* with Mrs. St. John, or the trustees of her settlement of the 7th November 1826. With respect to this second question, I have already expressed my opinion, and have seen no reason to alter it. Mr. Johnson never set up his claims in the office, nor made any objection to the report, and therefore could not, at the former hearing, have taken any exceptions to it. If he had intended to set up these claims, he should have made them in the office. It is true, that now, on the re-hearing every thing is open to him which would have been so at the former hearing; but this would not have been open to him. It is said that if the right is clear, on the facts found in the report, the Court will act upon it, without any exception having been taken. That might be so, if the right would necessarily follow; but not so if the right would have been liable to be

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encountered in the office by evidence, if it had been there claimed. Here one of the questions is upon the intention of Colonel Keatinge in paying off the shares of Mrs. Alexander and Mrs. St. John : that might have been established by written or *parol* evidence. I cannot, therefore, hold that the petitioner is now at liberty to raise either of those questions ; but even if he were, I consider the first question which has been raised untenable. I have been called on to reject the case of *Folkes v. Western* which, in my opinion, is directly to the point. It was there decided, that where the amount of the child's share was unascertained, the whole fund should go to the unprovided object of the power. It is said, that this decision of Sir W. Grant was mistaken, and that it has been overruled by a subsequent case of *Noel v. Lord Walsingham*, which has been quoted for the purpose. But so far from being overruled by that case, its authority was there expressly acknowledged by Sir John Leach, and to me that decision appears perfectly correct. It is founded partly on analogy to cases on the custom of London. I have looked into those cases, and think that there exists a strong analogy, and no answer is given to the argument of Sir W. Grant founded upon it, except that the custom is an unreasonable one. It has been argued that inasmuch as the portion is to be considered as vested, though liable to be divested, therefore, Sir W. Grant was not warranted in considering it as unascertained ; this seems founded on a mistake, for being vested is one thing, and being ascertained is another ; a portion of £1000, the right to which is vested, but which is liable to be reduced to any sum not illusory, is just as unascertained as if it were entirely contingent.

I should, therefore, if the point were open, require much stronger arguments than I have heard at the bar, or read in any of the authorities referred to, before I refuse to accede to the doctrine of Sir W. Grant in *Folkes v. Western*—as I have before said, in my opinion, the point is not open to the petitioner. But as the petitioner was misled by supposing he had a lien on the title deeds as a security for his claim, I shall give no costs against him.

Original decree affirmed in all respects.

EQUITY EXCHEQUER.*

Thursday, May 28th.

STATUTE OF LIMITATIONS—INTEREST—PLEADING.

CUMMINS v. ADAMS.

THE bill in this case was filed in 1836, by Cummins and wife, to raise a charge of £300. It stated an indenture of June 1816, which recited, that Wm. Horne deceased, was in his lifetime seized of and entitled to several interests and estates in certain lands therein mentioned; and being so seized upon the 23d of September 1799, made his will, whereby, amongst other things, he devised his estates to his three nephews, William, John, and Jonathan Horne, as tenants in common, who became possessed thereof; that they afterwards agreed between themselves to give £500 to their sister Catherine (the plaintiff) as a provision for her, and that accordingly a partition was agreed to. The indenture then witnessed, that in pursuance of said agreement, all the said lands were conveyed to John Baylor, a trustee; as to one portion of the said lands, to the use of the said William Horne, his heirs, &c., subject to £200, part of said sum of £500; and as to a certain other portion of said lands, to the use of the said Jonathan Horne, his heirs, &c., subject to £300, the residue of the said sum of £500; and also subject to an annuity of £18 to the use of the said Catherine, until she should attain her age of twenty-one, or be married, for her support and maintenance: and the said Jonathan did thereby covenant to pay the said sum of £18, the interest of the said sum of £300, until her age of twenty-one or marriage; and he did thereby charge and encumber all his portion of the said lands with the payment of said £300; and covenanted, that if said sum was unpaid after the expiration of four years next after said Catherine should attain

Where a defendant seeks to have the advantage of the 3 & 4 W. 4, c. 27, s. 42 (statute of limitations),† he must in general rely upon it in his pleading. *Semble.*

But where a third party (the mortgagee of the person who created the charge, to raise which the bill was filed), omitted to rely upon the statute expressly, but denied the existence of the debt in his answer in such terms as was considered to amount substantially to a reliance upon the statute, the Court would not deprive him of the benefit of the

statute; but holding that the question upon the bar of the statute was for the Court, and not for the Officer, the plaintiff, under the circumstances, was allowed to make out any case he was able before the Officer, to bring his claim within either of the exceptions in the act, and the Officer was directed to report specially thereon.

† The 3 & 4 W. 4, c. 27, s. 42, enacts—
“That after the 31st of December 1833,
“no arrears of rent, or of interest in respect of any sum of money charged upon
“or payable out of any land or rent, or in
“respect to any legacy, or any damages
“in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six

“years next after the same respectively
“shall have become due, or next after
“an acknowledgment of the same in
“writing shall have been given to the
“person entitled thereto, or his agent.
“signed by the person by whom the same
“was payable, or his agent,” *proviso*
where a mortgagee is in possession.

* The Exchequer Cases for Trinity Term are reported by Mr. BRADY.

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her age of twenty-one years, or be married, that then the said John Baylor might enter said lands, and, by sale or mortgage, raise thereout the said sum of £300 (this deed was registered in the following July)—That in January 1818, William Cummins married said Catherine, and thereby became entitled to the said sum of £300 in four years. The bill then stated, that in May 1821, Jonathan Horne demised his said portion of lands to John Adams, by way of mortgage, for the sum of £1474. 8s.; that Jonathan Horne died in October 1827, leaving certain children therein named; that the said John Adams refused to pay said sum of £300 and interest due thereon; that John Baylor declined to act, and prayed for an account and a receiver.

John Adams, by his answer, denied "that the principal sum of £300 "in said deed of 1816, or any part thereof, was due or owing to the plaintiffs, or that it was due to them, together with interest thereon, as stated "in the bill, or any sum whatever; or that any sum whatever was "due on foot of said charge, either for principal or interest; or that "plaintiffs or either of them have any just claim or demand on said "lands or any part thereof." The answer then stated that this sum was paid off in manner thereafter mentioned. It then went on to shew the manner in which the said sum was paid off, viz., by an arrangement whereby a third person advanced the £300 at the period of the marriage of the plaintiffs, upon the security of a judgment against Jonathan Horne and William Cummins, which, with interest due on foot of the charge in lieu of which it had been taken, was already raised out of the lands.

Upon the hearing of the cause, a controversy arose as to the period from which interest ought to be calculated upon this sum; which question was now discussed.

Mr. Bennett, Q. C., with whom was Mr. Bland.

The contest in this case is for eight years' interest. It is insisted, on the part of the defendant, that under the 3 & 4 W. 4, c. 27, s. 42, the plaintiff is only entitled to six years' interest on foot of the charge of £300, but the defendant has not pleaded the statute, nor set it up in his answer. The language of the 10 Car. 1, c. 6, s. 14, is stronger than that used in the recent statute, and yet the party could not take advantage of that statute unless he relied upon it in his pleading. The case of *Burne v. Robinson* (a), will be relied on on the other side; but the objection upon the omission of the defendant to rely upon the statute in his pleading was not made at the original hearing, whereas in this case it has been made at the original hearing, and I rely upon this distinction.—[PENNEFATHER, B. Even if the decree in that case be right

The decree to account ought to state the period from which the account is to be taken.—*Semble.*

(a) 1 Dru. & W. 688; S. C. 1 Ir. E. R. 333.

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I do not think it ought to embarrass the present case; but I doubt that it was right in form; I think it is informal in not stating the period from which the account is to be taken. It is the constant course of the Court to direct the time from which the account is to be taken.]—The case of *Prince v. Heylen* (a), is directly in point, and I rely upon it, as well as upon the invariable practice of this Court.—[PENNEFATHER, B. It does not appear from the report in *Drury and Walsh* whether the defendant in *Burne v. Robinson* relied upon the statute in his answer; and our decision may not, therefore, conflict with that case, because if he did not rely upon it there, the defendant has not done so in the present case.]—The question in this case is, whether the defendant can rely upon the statute, not having done so by his answer? And *Monypenny v. Bristow* (b), decides that he cannot.—[PENNEFATHER, B. It is quite clear that in all cases previous to the late statute, if the defendant meant to rely upon the statute of limitations, he should do so in his pleading.]—In England the invariable course has been to rely upon this statute in the defendant's pleading, when he sought the benefit of it; *Paget v. Foley* (c); *James v. Salter* (d). There are numerous cases familiar to the Court where a party has a defence by statute, for example the statute of frauds, which, if he do not plead, he will not be allowed to make at the hearing.

In all cases previous to the recent statute, if the defendant meant to rely upon the statute of limitations, he should do so in his pleading.

Messrs. Collins, Q. C., and Baldwin, contra.—If the course of pleading in equity be analogous to pleading at law, no one except the debtor can plead the statute;* and we are concerned not for the debtor but for the mortgagee.—[PENNEFATHER, B. Others may also rely upon the statute, where their interest is directly before the Court; in *scire facias*, for example, the terre-tenants may rely upon the statute.]—The necessity of pleading the old statutes even at law was an exception to the general rule, and limited to the English statutes 21 Jac. 1, c. 16, 32 Hen. 8, s. 2, and the earliest decisions were the other way; and the Courts refused to extend the rule to penal actions on the 31 Eliz. c. 5, the terms of which act are nearly similar to those in the statute under consideration. In *Foster v. Hodson* (e), it was decided that a party might take advantage of the statute upon general demurrer, which is a strong authority to shew that the party coming into Court should fully make out his case; and the same principle was established in *Hoare v. Peck* (f). But the case must be decided by *Burne v. Robinson*, the only decision upon the statute; and the case of *Walsh v. Walsh* (g) does

(a) 1 Atk. 494.

(b) 2 Russ. & M. 117.

(c) 3 Scott, 120.

(d) 2 Bing. N. S. 505.

(e) 19 Ves. 180.

(f) 6 Sim. 51.

(g) 1 Jones & C. 52; S. C. 1 Ir. E. R. 167.

* Blanshard's Statutes of Limitations, 141.

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not affect the question. In that case the question was, whether the amended bill was proper, and had relation back to the original bill?—[RICHARDS, B. There were other questions in the case, and other points decided; the report of the case in the 1 *Irish Equity Reports* is fuller than that in *Jones & Carey*, the latter being given *ex relatione*.]—It is, however, no authority against us. There is a great difference between the language of the 8 G. 1, c. 4, and the 3 & 4 W. 4, c. 27; in the former the defendant is given liberty “to plead payment” in bar of the action; in the latter the language of the 42d section is, “that no “arrears of interest,” &c., “shall be recovered but within six years next “after the same shall have become due;” and there is nothing about giving liberty to the party to plead the statute. The old statutes allowed a presumption of payment; the recent act declares that no arrears shall be recoverable save within six years. A judgment creditor files a bill and prays an account, and that other creditors should come in and prove their demands; an insolvent debtor may not rely upon the statute; surely the other creditors coming in, ought to be allowed to take advantage of it.—[PENNEFATHER, B. That is a strong reason why we should not decide the question now; and in that view *Burne v. Robinson* is strongly with you.]—In the 34th section of the act there is a specific enactment extinguishing the right.—[RICHARDS, B. That relates to lands.]—It shews, however, that the policy of the act is not merely to bar the remedy but the right also; and it extinguishes the right where it does the remedy. Upon an analogous subject, namely, rent and profits, the Court acted without the statute having been relied on, *Reade v. Reade* (a); and in a number of cases the Courts have confined the account to the filing of the bill from *laches* and other causes, *Barrington v. O'Brien* (b). The 40th section deals with the *corpus* of the fund, and may be said to be matter for the Court, but interest is a matter more for the office.—[RICHARDS, B. The bar of the statute is, in my opinion, for the consideration of the Court alone.]

Mr. *Bland* replied.—The cases cited were cases where the parties demurred to the whole of the bill, and the Courts keep them strictly to their demurrer; in this case the defendant could not do so. It has been expressly decided, that where a party has demurred to the whole bill, he cannot demur *ore tenus* to a part; and if he plead he cannot demur *ore tenus* at all; *Mills v. Campbell* (c); *Hook v. Dorman* (d). The 8 G. 1, c. 4, is confined to judgments, and is not analogous to the recent statute; but in the 10 Car. 1, c. 6, s. 14, which is the analogous act, negative words occur; and it never was contended at law that a

(a) 5 Ves. 744.

(b) 1 Ball & B. 180.

(c) 2 Y. & Col. 390.

(d) 1 Sim. & S. 237.

party was not obliged to plead the statute ; or, if the objection appeared upon the face of the bill, demur on record. It is a principle of equity pleading, that defendant must state in his pleading every thing upon which he means to rely ; and from the judgment in *Domville v. Lane* (a), it may be collected that the statute must be pleaded, when it is relied on. That this is the proper time to make the objection is established in *Smith v. Walsh* (b), and in *Garland v. Littlewood* (c).

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PENNEFATHER, B.

This case has been very fully argued ; unsatisfactorily, however, in one respect, affecting the law both in England and Ireland, in not furnishing us with any authority directly in point. If it were required here, we would come to a decision, whether, in every case, it be necessary for a defendant, who wishes to have the benefit of the statute of limitations, to rely upon it in his pleading ; but we are of opinion, from the way in which the present case comes before the Court, that we are not now obliged to decide that question. Generally speaking, it is true that a defendant, who wishes to rely upon a particular defence, should do so by plea, answer, or demurrer, if the plaintiff's pleading permits it ; and generally, if he does not do so, he will not be permitted to rely on such defence at the hearing on pleadings and proofs. The present case is peculiar : the defendant, who is now before us, is not the person who created this charge ; he is the mortgagee of the person who created it, and he swears that it is not a subsisting charge, and that there is nothing due on foot of it ; and, relying upon this circumstance, we are of opinion that he does virtually and substantially rely upon the statute of limitations. We are far from laying down as a general rule, that a party who created a charge, or one who represents such party, can rely upon the statute, without relying upon it in his pleading. The rule requiring him to do so is convenient, and it is just ; it is calculated to save expense and to prevent surprise ; and we would not, therefore, lay down any rule which would conflict with it ; but considering the situation of the defendant, and that the answer substantially apprises the plaintiff that the statute would be relied on, we do not think, in the present case, we ought to deprive the defendant of the advantage of the statute. On the other hand, for want of precision in the defendant's answer, and from the manner in which he has framed his case, there may have been surprise upon the plaintiffs, and they may be able to bring their case within some of the exceptions in the statute ; and therefore, on account of the peculiar circumstances of this case, holding the opinion that the Court ought to dispose of this ques-

(a) C. & Dix R. 182.

(b) 1 Ir. E. R. 167.

(c) 1 Bev. R. 527.

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tion, we will frame our decree to allow the question to be open for the final decree, and we will direct the Officer to report the special circumstances, which may entitle the plaintiff to more than six years' interest.

FOSTER, B., concurred. It is not necessary to decide the question as to the necessity of the defendant pleading the statute in all cases. There is no reason for depriving the present defendant of the benefit of the statute upon that ground, as he has substantially relied upon it in his answer.

RICHARDS, B.

The facts in this case are very peculiar and special, and I do not think this is the time that we ought to decide that the plaintiff is bound to state his case on his bill to be within the 40th or 42d sections, or that the defendant must rely upon the statute in his pleading, in order to avail himself of it. The defendant in this case is a stranger to the plaintiff, and he states suspicious circumstances; and there being no decision upon the statute, it would be too much to close the door upon him, or prevent him from relying upon its provisions; and moreover, the plaintiff has been fully apprised of the case upon which the defendant meant to rely. I quite concur in the propriety of leaving the matter open, and that this question never ought to be left to the Officer. Were I to do so, I conceive we would be delegating a duty which we ought not to delegate.*

* See *Drought v. Jones*, 3 Ir. E. R. 303.

Saturday, June 20th.

PRACTICE—RECEIVER VACATING HIS RECOGNIZANCE— CONSENT.

IN re FITZGERALD, Petitioner, v. HILL, Respondent.

The Court will not vacate a receiver's recognizance at the same time he is discharged, even upon the consent of all the parties in the cause.

MR. WILLIAM MARA applied for an order to discharge the receiver in this cause, and have a vacate entered upon his recognizance. The application was grounded upon the consent of all the parties in the cause.

RICHARDS, B., granted the first part of the application; but refused the latter part of the motion, as to vacating the receiver's recognizance.*

* In this Court, it is not the practice to vacate a receiver's recognizance until a year has elapsed from the period of his discharge. See 3 *Stewart's Farms*, 1485.

Thursday, June 4th.

AGREEMENT—ACCOUNT—LANDLORD AND TENANT—
PRINCIPAL AND AGENT.

CALLAGHAN v. PEPPER.

THE bill in this case was filed for the specific performance of an agreement for a lease for twenty-one years, against the defendant Susan Pepper, and for an account, &c. It appeared from the pleadings and proofs in the cause, that the defendant, who had been for a long time resident abroad, except occasionally for short intervals, was seized of the lands in question for one life; that the plaintiff entered into a treaty for a lease for twenty-one years of a part thereof, with one Roome, the agent of the defendant; and upon the 9th of April 1821, by a certain proposal or agreement in writing, the plaintiff proposed or agreed to pay to the defendant the sum of £28 a-year for the same for twenty-one years, which document was signed by the plaintiff as an executing party, and by Roome, not in the precise place of an executing party, but at foot of the agreement, between the name of the subscribing witness who proved it, and that of the plaintiff; and that thereupon the possession of said farm was given by Roome to the plaintiff, who was admitted to be in the habit of receiving proposals for, and giving possession of defendant's lands; but there was no proof of his having executed agreements or granted leases, save that parties treating with him were not afterwards disturbed; that plaintiff entered and expended money in improvements; that in 1824 Roome made a *parol* agreement for another farm, part of the same lands, for a like term, to commence from same period as former lease, and promised to have a lease of both farms executed as soon as defendant, who during this time resided in England, would come to Ireland; and he then stated that he expected her very soon. In consequence thereof, the plaintiff expended sums of money in improvements, with the full knowledge of the defendant; that that the plaintiff, in May 1826, waited upon the defendant, who had come to this country, to pay a half-year's rent then due and arrange about the leases; that having paid the half-year's rent due under the agreement, she gave a receipt for it, and expressed herself perfectly

Bill for specific performance of a lease for 21 years, and for an account. It appeared that the defendant held the lands for one life; that the agreement was executed by the agent of the defendant, and possession given under it, and money expended in improvements; but the defendant swore that her agent had no authority from her to do so. There was also evidence of her having subsequently recognised the agreement, and promised to execute a lease pursuant thereto. It appeared that a civil bill ejectment was served upon the plaintiff, and another upon two of his under-tenants. The former was dismissed, but the latter being undefended, a decree was obtained thereon,

under which he was turned out of possession. In about three years afterwards this bill was filed. Pending the proceedings, the *cestui que vie* in the defendant's lease died: *Held*—That the plaintiff was entitled to an account of the rents and profits of these lands which the defendant had received, or which, without wilful default, she might have received from the day of the execution of the civil bill decree, up to the day of the death of the *cestui que vie*.

In this case the Court would decree a specific performance, if the defendant's interest had not expired.—*Semble*.

The authority of an agent to contract for a lease of lands need not be in writing.

A proposal in writing for a lease to an agent, who has not power to enter into a contract for such lease, may be acknowledged by *parol* by the principal, so as to be binding on the principal.—*Semble*.

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satisfied with his treatment of the farms, promised to execute a lease of both the farms in pursuance of said agreements, and told him to get the same prepared; that the defendant, before the said leases were prepared, again left this country, and plaintiff was unable to present them for execution; that plaintiff regularly paid rent to one Morrogh, who was appointed agent in place of Roome, until 1830, and afterwards to one Hickey, who succeeded Morrogh in the agency, until 1832, when notices to quit and civil bill ejectments thereon were brought against plaintiff and his two under-tenants. Plaintiff took defence to the civil bill served upon him, which was dismissed, with costs; but the civil bill against the under-tenants, with which the plaintiff was not served, not having been defended, a decree was obtained upon it, by virtue of which plaintiff was turned out of possession in July 1833, and since this period defendant has continued in possession.

The defendant, by her answer, positively denied that Roome was at any time her agent for the purpose of making leases or agreements for leases; she denied also, that in her conversation with the plaintiff, she promised to execute leases, unless certain reservations and clauses were introduced into them, particularly as to the terms being subject to the continuance of her interest, which he refused to agree to, upon which she positively refused to execute any such leases to him. She also denied that the plaintiff made any considerable expenditure upon the farms, and stated that the civil bill ejectment against plaintiff was dismissed, no one appearing to prosecute it, and not upon the merits. There was evidence of Roome's letting parties into possession of the lands, distraining tenants, and receiving rents; but Morrogh, the successor of Roome, deposed that he never had authority to enter into agreements for leases, or to let any part of the lands without defendant's approbation, but was authorised to receive proposals. One witness, Denis Callaghan, who was put out of possession, proved the promise of defendant to execute the lease. Subsequently to the filing of the bill, the interest in the lease under which the defendant held these lands expired, by the death of the *cestui que vie* in the lease; Roome was also dead.

Mr. *Smith*, Q. C., and Messrs. *Rogers* and *Baldwin*, for the plaintiffs, relied upon the agreement with Roome, the subsequent recognition of it by the defendant, and the fraudulent manner in which the plaintiff was dispossessed.

Mr. *Bennett*, Q. C., Mr. *Collins*, Q. C., and Mr. *Mullins*, for the defendant, contended that Roome had no authority to bind the defendant by such an agreement as was relied on, and that this was plain from the evidence of Morrogh who succeeded him; his authority

was limited to receiving proposals, and submitting them to the defendant for her approbation. *Clinan v. Cooke (a)*. The Court could not believe the defendant would enter into a contract for an absolute term of twenty-one years, where her own interest depended on a single life. Upon the face of the agreement, it appears that he signed this document as a witness, and not as an executing party to the contract.

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There is a great difference between proposals or contracts for leases, and leases; because the authority to execute the latter should be in writing, but the authority to execute the former need not (*b*); and even supposing that Roome was a mere witness to this document, there is a quantity of evidence to shew that the defendant was aware of the existence of it; and then the proposal being in writing she may acknowledge it by *parol*. The defendant's knowledge of that proposal and that the plaintiff got possession under it, and her not dissenting from it, but suffering him to remain in possession, is quite enough to bind her. The authority of the agent was recognised by her own acts when she was applied to for the lease; and there was also a recognition that the plaintiff was in possession under that proposal. Suppose also, that Roome had no authority to execute such an agreement as is relied upon in this case, but merely to receive a proposal and send it for approval to the defendant; yet if she then acceded to it (and there is evidence that she did so, for she promised to execute a lease pursuant to that proposal), is it not a recognition of the whole of the treaty between Roome and the plaintiff, and of the possession given under that agreement by the former to the latter? and giving possession under a *parol* agreement is part performance. But moreover, the manner in which the defendant obtained possession, was a proceeding which amounted very nearly, if not altogether, to fraud. Upon these grounds, although we cannot decree a specific performance, we will decree an account.

FOSTER, B., concurred.

RICHARDS, B.

The defendant admits Roome had partial authority, and the public are allowed to deal with him as the agent of this property; it, therefore, lay upon the defendant to shew how far he was agent, and if she did not execute a power of attorney to him, she cannot blame the Court for not conjecturing in her favor.

(a) 1 Sch. & L. 22, 27, 31.

(b) *Deverell v. Lord Bolton*, 18 Ves. 509; *Mortlock v. Buller*, 10 Ves. 311; 2 Dow. 510; *Coles v. Trecothick*, 9 Ves. 250; S. C. 1 Smith, 233.

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Decree an account of what the defendant received, or without wilful default might have received out of the lands, &c., in the pleadings, from the 21st day of June 1839, the day on which possession was taken under the civil bill, up to the 28th day of September 1839, the day upon which the *cestui que vie* in the defendant's lease died; that in taking the account regard be had to the lands being cropped when taken possession of, and that defendant have credit for the rent payable out of said lands; and that a balance be struck, and if due to defendant by plaintiff that same be paid within one month after report confirmed; and if by defendant to plaintiff, that same be paid within same period by defendant to plaintiff, together with plaintiff's costs; and if balance found in favor of defendant, that plaintiff may set down cause for further directions as to costs, &c.

Friday 5th, Wednesday 10th, and Friday 12th of June, 1840.

WILL, CONSTRUCTION OF—DOUBLE PORTIONS—
ELECTION—COSTS.

GRAHAM v. THYNE.

A. upon the marriage of his daughter B. in 1794 granted to trustees an annuity of £100 out of part of the lands of C. in trust for her husband for life, and after his death for B. for her life in case she should survive her husband,

THE bill in this case was filed to raise the arrears due on foot of two annuities.

and after death of the survivor for the children of the marriage, in such shares as the parents &c. In January 1813 A. made his will, and after minutely specifying the property of which he was possessed, the head rents and profit rents of each, he devised all these to trustees "to, for, and upon the several trusts and purposes hereinafter mentioned and none other;" and "after payment of the head rents payable thereout" to apply same to the trusts thereafter mentioned; he then directed them to pay £100 a-year to his wife, and subject thereto, he gave to B. an annuity of £50 a-year for her life, and upon the decease of his wife a further annuity to her of £50 a-year, "said two annuities to B. for her sole and separate use, free from the control of her said husband;" and subject to the "head rents" and "to these two annuities to his wife and daughter," he disposed of the rest of his property, without making any allusion to the charge upon it under the deed of 1794. He died leaving B. and her husband surviving; the latter having died, and a party who became entitled to some of the lands charged with these two annuities having refused to continue to pay both, she filed a bill to raise the arrears; *Held* that she was bound to elect.

The plaintiff was the only daughter of James Dunn, who, upon the occasion of her marriage in 1794, by deed of settlement, granted to trustees an annuity of £100, out of part of the lands of Cullenswood, in trust for Robert Graham her then intended husband, for life; and after his death, then for his daughter Margaret Graham, the plaintiff, for her life, in case she should survive her husband; and after the death of the survivor, in trust for the children of the marriage, in such

shares as the parents should appoint, or, in default of appointment equally.

Upon the 25th of January 1813, James Dunn made his will, which stated that he was possessed of certain premises in King's-head-court, in the city of Dublin, for a term of 87 years from may 1783, at the yearly rent of £19—and that same was then producing a profit rent of £100 a-year; and also of a certain plot of ground at Ranelagh in the county of Dublin, for a term of 50 years unexpired, at £40 a-year, which then yielded a profit rent of about £51; and also of certain lands and houses at Cullenswood in said county, for a term of 999 years from the 24th of March 1785, at £93 a-year, which, exclusive of one of said houses in which he himself resided, then, produced a clear profit rent of £460; and also certain lands at Dumville in said county, for a term of 970 years from the of March 1811 at £80 a-year, which were then unset, but would produce a profit rent of £350; and also of other personal estate, bonds, &c. to the amount of £700. It then recited that he had a wife Anne Dunn, one daughter Elizabeth, then the wife of Robert Graham, and also several grandchildren viz., one son and seven daughters of said Elizabeth and Robert Graham, whom he named, and added "it is my principal intention to "make a provision for my said wife and daughter, and as far as in my "power and the law will admit of, to make an equal provision for all and "every my said grand-children, and for any which may be begotten by "and between said Robert and Elizabeth, and to limit my aforementioned "properties, subject as hereinafter to my grand-children, begotten or to "be begotten, in equal shares and proportions." He then devised all his estate and interest in the several leaseholds above mentioned, and all other his estates and properties whether real, freehold or personal, whereof he should die possessed of or entitled to, to three trustees, and to their heirs, executors, &c., and to the heirs, executors, &c. of the survivor, "*to, for, and upon the several trusts and purposes hereinafter mentioned, and none other.*" He then empowered his trustees to take possession of all his estates and properties and after "*payment of the head rents payable thereout,* to apply and dispose of the same to, for, and "upon the several trusts, intents, and purposes hereinafter declared of "and concerning the same, and with respect to the disposition of my said "estates and properties, I give" &c.; he then gave the use of his dwelling-house to his wife for her life, and he ordered them to pay to her £100 a-year during her life; and subject thereto, he gave to his daughter Elizabeth, the wife of the said Graham, an annuity or yearly sum of £50 to be paid her during her life by his trustees; and he added "it being my "wish to advance and increase said annuity for my daughter upon the "decease of my wife to £100 a-year during her life, I do hereby further "bequeath unto my said daughter a further annuity of £50 to be paid to

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"her during her life, in addition to the said sum of £50 I have already "bequeathed to her by this my will," said two annuities to be for her sole and separate use, independent of her said husband Robert Graham : and subject to said two annuities of £100 each, to his wife and daughter, he directed his trustees to pay to his two elder grand-children the sum of £300 each, if they should attain the age of twenty-one, on their attaining that age ; and he directed this sum to be raised out of his personal estate, save his leasehold property, and if that were insufficient he directed the trustees to apply the surplus of his said rents, after payment of the *head rents* of said premises, and *said afore-mentioned annuities* in order to create such sum. The will then proceeded, "and it is my "further intention and my will is that next after the said afore-mentioned "annuities, and the said sum of £600 shall be allocated and subject there- "to ;" he then gave several small legacies ; and with respect to all and singular, the rest, residue, and remainder of his estates and properties of what nature or kind soever, he directed his trustees "after payment of the afore-mentioned *head rents, annuities and legacies*", to pay for the maintenance and education of his said grand-children then begotten, or which might thereafter be begotten, until the eldest should attain twenty-one, and if that happens, that then they should divide all his estates and properties in equal shares and proportions amongst all the grand-children who should be then living, giving them life interests in it, and making other dispositions with respect to it, not material to the question argued. He died shortly afterwards, leaving Robert and Elizabeth Graham living ; Robert Graham being dead, Elizabeth Graham now filed her bill to raise the arrears on foot of the annuity in the deed of settlement, and also on foot of the annuity given to her by the will. The question was, whether the plaintiff was entitled to both annuities of £100, or whether the annuity in the will was a satisfaction of that in the deed of marriage settlement ; or that she should elect between them. There was a deed of 1815 read, which purported to be an assignment by the said Robert Graham to James Dunn, of all his property, but it did not affect the decision of the Court.

Mr. Keatinge, Q. C., with whom were Messrs. Brewster, Q. C., and Revell,—contended that the manifest intention of the testator was to give to his daughter, whom he described as the principal object of his bounty, the annuity in the will, in addition to what he had already secured by the settlement.—[PENNEFATHER, B. said that the difficulties which occurred to him, were, how the testator could intend what he gave by his will to be a substitution for what he gave by the marriage settlement ; because under the latter, the husband was at that time entitled to £100 a-year, whereas what he gave by his will was £50 a-year to his daughter for her sole and separate use, and after her mother's death £100 a year.

Mr. *Thynne*, the defendant, argued this case in person—The Courts lean strongly against double portions. *Copley v. Copley* (a); *Byde v. Byde* (b); *Brewin v. Brewin* (c); this is true, although contrary to the intention of the donor, and although payable at different times; *Jesson v. Jesson* (d); *Thomas v. Kemys* (e). The case of *Bellasin v. Uthwath* (f), was decided upon peculiar grounds; and the relaxation of the rule in this case is not followed, *Bradish v. Bradish* (g); *Savage v. Carroll* (h); *Hinchcliffe v. Hinchcliffe* (i); in the judgment in the latter case the Master of the Rolls denies strongly, that the rule of the Court against double portions was at all shaken by the case of *Warren v. Warren* (k). The cases of *Weall v. Rice* (l); *Earl of Glengal v. Barnard* (m); *Jones v. Morgan* (n); are all strong authorities, directly in point, in favor of the principle, that the provision in the will in this case was in satisfaction of that provided by the settlement.

Mr. *Monahan*, Q. C., for one of the residuary legatees, followed in support of Mr. *Thynne's* views. The plaintiff cannot claim the annuity under the will without giving up her claim under the settlement. It is matter of indifference as regards the right of the residuary legatees, whether the testator had or had not in his view, at the time of making his will, the provision he had already made for his daughter, if it appear that it was the testator's intention that they should have the estate clear of the second annuity. Now it is plain from the will, that he only intended to charge these lands with the two annuities, one for the daughter and the other for his wife. The principle which regulates cases like the present is stated in 2 *Roper on Legacies* 480; and the cases of *M^r Namara v. Jones* (o), and *Blake v. Banbury* (p), are very similar to this case, and decide that the plaintiff must elect to take either under the settlement or the will. [RICHARDS, B. The testator by his will purchases a right of disposing of his property different from the provisions in the settlement, and his Lordship referred to *Cary v. Cary* (q), where this same doctrine is laid down.]

Messrs. *Brewster*, Q. C., and Mr. *Revell*, contra.—The gift to the daughter in the settlement is different from that in the will as to the time of payment; and it is quite plain also, that by the latter he

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| (a) 1 Pr. W. 146. | (b) 2 Eden 18; S. C. 1 Cox 44. |
| (c) 2 Vern. 439; S. C. Prec. Chan. 195. | (d) 2 Vern. 255. |
| (e) 2 Vern. 348; S. C. 2 Freem. 207. | (f) 1 Atk. 426; S. C. 1 West, 273. |
| (g) 2 Ball & B. 479. | (h) 1 Ball & B. 265. |
| (i) 3 Ves. 516. | (k) 1 Bro. C. C. 305. |
| (l) 2 Russ. & M. 251. | (m) 1 Keene, 769. |
| (n) 2 Y. & Col. 403. | (o) 1 Bro. C. C. 481. |
| (p) 4 Bro. C. C. 21; S. C. 1 Ves. J. 514. | (q) 2 Sch. & L. 173. |

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intended to make a provision for his daughter, without regard to her husband, and free from his control: a provision which she might enjoy while her husband was receiving his annuity under the settlement, and which was to be wholly independent of any provisions made therein. As to this being a satisfaction, it is plain it is not, upon numerous authorities. In *Adams v. Lavender* (a), a slight difference as to the time of payment was held sufficient to prevent a bequest of £1000 from being considered a satisfaction of an obligation to pay a sum of £500; and the same rule was followed in *Currie v. Pie* (b); and very recently in *Wharton v. Earl of Durham* (c), first by the Vice-Chancellor, and afterwards by the Lord Chancellor, upon appeal—a case in all its particulars like the present—[Mr. Thynne remarked that this case was a strong authority in his favor, as it subsequently came before the House of Lords (d), and the decision below was reversed.]—The doctrine with respect to election is laid down in *Blake v. Bunbury*, which has been referred to; and it is there said that the disposition by the testator must appear upon the face of the will by declaration plain, or by necessary conclusion from the circumstances disclosed by the will; and the same principle is stated in the note to *Dillon v. Parker* (e), where the whole law upon this subject is laid down. In the present case, there is no such declaration plain, as is here required.—[PENNEFATHER, B. In this case, the Court must be satisfied that the testator meant to give the property to the devisees free and discharged from the first annuity.]—That could not have been his intention, for at the time he made the will the husband was living; and the argument relied on would set aside Graham's annuity as well as his wife's, namely, that the children were to take the lands free and discharged of the annuity in the settlement. The first annuity was only charged upon a portion of the lands devised, and this accounts for his omitting to refer to it. The doctrine of election arises where the claim would defeat the will; but in this case, to say that this bequest defeats the annuity, is saying that it defeats the rights of Graham under the settlement; and every case of election arises where all the property is subject to the claim.—[PENNEFATHER, B. The reasoning does not go upon that; but that no person shall take under the will and disappoint it.]—In *Ayres v. Willis* (f), the Lord Chancellor puts a case, which is *totidem verbis* the present case:—"Suppose a child is entitled to a rent-charge, or such an interest "out of a real estate belonging to his father, who makes a provision

(a) M'C. & Y. 41.

(b) 17 Ves. 462.

(c) 5 Sim. 297; S. C. 3 Myl. & K. 472.

(d) 10 Bli., N. S. 526.

(e) 1 Swans. 401; S. C. 1 Jac. 505 & 1 Col. & F. P. C. 303.

(f) 1 Ves. sen. 231.

"for him by legacy or portion, and devises that real estate to another child, without taking notice of the rent-charge, that child is entitled to the rent-charge."—[PENNEFATHER, B. There is no intention there to give away the land free of the rent-charge. In the present case, it is argued, that upon the face of this will there is a plain intention that he meant to dispose of the lands free from the first annuity; and this is the part of the case which presses us.]—The motive he expresses is to confer a benefit upon his daughter. The following authorities are strongly in favor of the plaintiff:—2 *Sugd. on Powers*, 163; *Dummer v. Pitcher* (a); *Dixon v. Samson* (b); *Lord Raneliffe v. Lady Parkyns* (c); *Tibbitts v. Tibbitts* (d).—[PENNEFATHER, B. The facts in the case of *Blake v. Bunbury* referred to by Mr. *Mona-han* are very much to be considered; and that case decides, that if a man has an estate subject to incumbrances, and he devise that estate as if free from them, the disposition will be valid, and the incumbrancers claiming under the will, will be put to their election. It is a very strong case, because the incumbrances in that case arose by settlement; and although the testator actually confirmed the settlement, the Court held from the intention apparent on the will, that he meant to dispose of the estate free from these incumbrances.]

A question arose as to costs, but the Court said that in this case the difficulty has arisen upon the will, and in dismissing a bill under such circumstances the Court never dismisses it with costs.

Saturday, June 20th.

PENNEFATHER, B.* this day delivered the judgment of the Court.

We have very fully considered this case. The question which arises upon the will of James Dunn is, whether the annuity of £100 given to his daughter in his will, is in addition to the annuity of £100 given to her by the settlement of 1794? By that settlement £100 a-year was provided for the plaintiff in case she survived her husband; and the testator subsequently by his will gave to his wife £100 a-year, and £50 a-year to the plaintiff, to be increased by £50 a-year after her mother's death;—and after enumerating different properties of which he was then possessed, with great particularity, he left them subject to some other legacies, to be divided between the children of the plaintiff. It was insisted by Mr. *Thynne* that the second annuity is not to be deemed cumulative; that it is a satisfaction of the first, or, at all events, that the plaintiff is bound to elect between them. As this case is circumstanced, satisfaction and election come to be very much the same; although many cases of election may be found, where there is no satis-

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Where a bill is filed in consequence of a difficulty arising upon the will, under which the adverse parties claim, the Court in dismissing it will not give costs.

(a) 2 Myl. & K. 262; S. C. 5 Sim. 35.

(c) 6 Dow. P. C. 149.

(b) 2 Y. & Col. 566.

(d) 19 Ves. 656; S. C. 1 Jac. 317.

* *Solus.*

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faction. But whether this is a case of satisfaction properly so called, or of election properly so called, we think it was very clearly the intention of the ancestor to give his property to the plaintiff's children free from more than £100 a-year for the plaintiff. She cannot therefore have both; she is bound to elect. The bill must, therefore, be dismissed; but without costs, as the difficulty was raised by the settlor himself, and all the family have acquiesced for a long time. We come to this decision with great reluctance, as the plaintiff has enjoyed both annuities for a long time; but her children we hope do not entertain the same feelings as Mr. Thynne, and they may not think themselves called upon to deprive their mother of this income; as far as their shares are subject to it.

Thursday, June 4th.

RECEIVER—SHERIFFS' ACT.

In re MONAHAN, Petitioner; KIRWAN, Respondent.

Where the receiver under the sheriffs' act applied for an attachment against a tenant for not paying rent, and it appeared that the respondent made a lease of the premises in question to the tenant, and that a declaration of trust was entered into contemporaneously with that lease, to the effect that the tenant held in trust for A. who it appeared had an incumbrance affecting the respondent's estate prior to any of the judgments which formed the subject-matter of the petitioner's claims;—the Court directed a reference to the Remembrancer to inquire and report as to A.'s rights.

THE receiver in this matter who was appointed under the sheriffs' act, and subsequently extended to the matter of three several other petitions under that act, applied to the Court in the Sittings after last Hilary Term for an attachment against a tenant for not paying his rent, and upon the usual affidavit obtained a condition order for the purpose. An affidavit having been filed by the tenant as cause against that conditional order,

Mr. Garcey, on behalf of the receiver, now applied to the Court to make the conditional order absolute, notwithstanding the cause shewn.

Mr. Walter Bourke, on behalf of the tenant, stated the affidavit to the Court, by which it appeared that the respondent made a lease of the premises in question to the tenant, and that a declaration of trust or some agreement was entered into contemporaneously with that lease, by which it was agreed that the lease was made to the tenant in trust for Mrs. Magg Taaffe, who it appeared had a lien or incumbrance affecting the respondent's estate, prior to the date of any of the judgments which formed the subject-matter of the petitioner's claims, and that the rent reserved by that lease should be set off against the demand so due to Mrs. Taaffe.

Upon hearing Mr. Jennings on behalf of the petitioners,

the Court directed a reference to the Remembrancer to inquire and report as to A.'s rights.

The Court directed a reference to the Remembrancer to inquire and report whether Mrs. Magg Taaffe was or was not entitled to such prior incumbrance, and in what right; and whether a tenant was or was not entitled to set off the rent payable by him against the claim of Mrs. Taaffe, and reserved further consideration until the return of the report.

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Friday, June 5th.

**PRACTICE—ATTACHMENT—RECEIVER—
TITHE RENT-CHARGE.**

**BROWN v. BROWN.
Ex parte Rev. W. HORE.**

THIS was an application on behalf of the Rev. W. Hore, for an attachment against the receiver in this cause for not paying the rent-charge due to the applicant, out of the lands over which he had been appointed.

It appeared from the affidavit upon which the motion was grounded, that the receiver was appointed in January 1838; upon the 8th of May 1839 the certificate of the Second Remembrancer was obtained, authorising the receiver to pay to Mr. Hore, £26 18s. 6d., as and for one year's rent-charge in lieu of tithes payable out of the lands in the pleadings, up to the 1st of November 1838, and also £3 for costs of the certificate, and to take credit for the same in passing his account; upon the 9th of June the receiver was personally served with the certificate; that not being able to obtain payment from the receiver, an order upon him to account was obtained on the 18th of January 1840; that he accordingly filed his account, but the Remembrancer refused to pass same, in consequence of the receiver not having paid the amount of the rent-charge; and he directed a notice to be served upon the receiver, calling upon him to pay the rent-charge on or before a certain day, otherwise that the present motion would be made; and that the receiver then owed to the applicant £87. 6s. 3d.

Mr. Braddell, for the Rev. Mr. Hore, relied upon the foregoing affidavit.

Saturday, June 6th.

RICHARDS, B. I have mentioned this case to my Brother PENNEFATHER, and we are of opinion that it is better to uphold the rules of the Court, and decide that the receiver ought to have paid this sum according to the allocation of the Officer. By the rule of the 1st of December 1836 (a), receivers were ordered to pay tithe composition on obtaining the approbation of the Remembrancer; and that rule has been continued

Where the remembrancer has allocated a certain sum to be paid by a receiver as the tithe rent-charge due out of the lands over which he has been appointed; and his certificate has been served upon the receiver, and a personal demand made for the amount of such rent-charge, upon non-payment of same the party entitled will obtain an attachment against the receiver. The general order of the Court directing the receiver to pay the tithe rent-charge, amounts to an order to pay in each particular case.

(a) Lowry's Rules, 155.

1840.

BROWN
v.
BROWN.

by the rule of the 30th of November 1838 (a), and its provisions applied to rent-charges.

In this case you have made a personal demand, and the receiver has from time to time promised by letter and *parol* to pay this sum. It is less onerous and less expensive to the receiver to grant this order at once, than it would be, first, to grant an order upon him to pay the amount, and then an order for an attachment for not complying with that order; there having been a personal demand made upon him, and service of the Remembrancer's certificate. We are of opinion that the general order amounts to an order to pay in each particular case.*

(a) Lowry's Sup. 162, a.

* See *Reilly v. Reilly*, O'Leary on Tithe Rent-charges, 248.

Saturday, June 6th.

RECEIVER—LANDLORD AND TENANT.

Executors of HILL, Petitioners; KERR, Respondent.

Upon an application for a receiver under the 5 & 6 W. 4, c. 55, over premises held under a lease, the tenant's interest in which had been evicted by ejectment for non-payment of rent, but the time for redemption had not expired; the Court will make an order for a receiver, the petitioner undertaking to pay the sum due to the landlord for debt and costs, and will not put the party to a redemption bill.

MR. T. K. LOWRY moved, under the 5 & 6 W. 4, c. 55, on foot of a judgment obtained by the petitioners against the respondent, in Easter Term last, that a receiver might be appointed over a farm in the townland of Ballybracken, county of Antrim, held by the respondent under a lease for lives. It appeared, however, from the affidavit of the petitioners, that the farm, over which the receiver was sought, was at the time in the possession of Edward Bruce, Esq., the head landlord, under a civil bill ejectment decree obtained by him against the respondent, on the 2d of April last, for non-payment of one year and a-half's head-rent of the premises; but that the time for redemption had not expired. The petitioners offered, on getting the receiver appointed, to pay off the rent and costs due to the landlord.

Per Curiam.

Take a conditional order for a receiver over the lands and premises in the petition mentioned, serving the order on the respondent and any person in possession as a creditor, without prejudice to the rights of the head-landlord; the petitioners undertaking to discharge the sum due to the head-landlord for rent and costs.

On a subsequent day, this rule was made absolute, upon a certificate of no cause.

Saturday, June 20th.

PRACTICE—NOTICE—LODGING MONEY.

BYRNE v. LANGMORE.

MR. FEARON applied, on behalf of the sequestrators in this cause, for liberty to lodge a sum of money received by them in bank stock. The motion was not on notice.

A motion on behalf of sequestrators, to lodge money, must be upon notice.

PENNEFATHER, B.

A notice of this motion ought to have been given to the parties.

No rule.

PRACTICE—NOTICE—RENEWAL OF ORDER.

BROWNE v. LYNCH.

MR. THOMAS KENNEDY applied for leave to renew an order made in this case on the 9th of February 1839. The order was for liberty to a party to file a charge and prove in the cause.

A motion to renew an order in a cause must be upon notice.

PENNEFATHER, B.

You ought to have given notice of this motion ; not having done so, it must be refused.

No rule.

Monday, June 22d.

**PRACTICE—RECEIVER—VACATING RECOGNIZANCE OF—
SENDING BACK ACCOUNT.**

D'ARCY v. SHERRY.

D'ARCY v. CALLAN.

IN this case, the receiver served notice to be discharged, and to vacate his recognizance. There was a cross-notice to have his last account sent back to be reviewed. The latter notice did not specify any of the items in the accounts objected to, but referred to the affidavit used on the motion for these particulars.

A notice of motion to have a receiver's account sent back to be reviewed, must specify the items objected to; it is not sufficient to refer for them to the affidavit used upon the motion.

Mr. Brooke, Q. C., for the receiver.

A motion to vacate the recognizance, at the same time that the receiver applies to be discharged, is premature.

NOTES IN THE EQUITY EXCHEQUER.

Contra.

THE SHERIFF, B.

The notice to send back the account ought to specify the precise items upon which you seek to send back the account. It is a very convenient practice to apply, for this purpose, upon matters particularly mentioned in the affidavit. That motion must therefore be refused, inasmuch as the notice does not specify any items objected to; and the motion to vacate the recognisance must also be refused, as being premature.*

Motion refused.

* See *Fitzgerald v. Hill*.

Wednesday, June 24th.

RECEIVER—VERIFYING AFFIDAVIT—SHERIFFS' ACT.

In re KROGH v. KROGH.

A conditional order for a receiver will be discharged, if there be no verifying affidavit by the attorney as to the service of the conditional order.

MR. ARMSTRONG applied to make absolute a conditional order for a receiver under the Sheriffs Act, notwithstanding the cause shown.

Mr. Rolleston objected, that there was no affidavit on the part of the attorney, verifying the service of the conditional order, as required by the rule of the Court.*

Per Curiam.—Allow the cause shown.

Rule discharged.

* General Order, 130, 4th December, 1835. *Lowry's Rules* 150.

Friday, June 26th.

PRACTICE—RECEIVER—MONEY IN HANDS.

In re ———.

A receiver under the Sheriffs Act will be directed to pay out of money in his hands to the petitioner, although he has not accounted, where it appears that the petitioner was the only creditor in Court.

MR. JOHN DILLON applied on behalf of the petitioner, a judgment creditor, who had obtained a receiver under the Sheriffs' Act, that the

receiver should pay over to him £16, then in his hands. It appeared that the receiver had not passed any account, but that the petitioner was the only creditor in Court; and that the receiver was anxious to pay over this sum, but wished to be protected by the order of the Court. He also applied for the costs of the motion.

1840.

IN RE

PENNEFATHER, B., after some hesitation, granted the motion.

Motion granted, with costs.

Wednesday, June 24th.

PRACTICE—COSTS—FORECLOSURE SUITS.

CANE v. BROWNRIGG and others.

THE bill in this cause had been filed to foreclose a mortgage. There had been a decree to account, and thereunder the Second Remembrancer had reported the rights of the several parties, plaintiff and defendants. This report was unexcepted to, and the cause now came on to be heard on report and merits, and for a final decree.

It appeared that the mortgagee had by his will bequeathed the mortgage debt in different portions to several persons, and amongst those, had bequeathed the sum of £2,000 to John Shea and James Wemys, and the survivor of them, his executors and administrators, as trustees on certain trusts in said will mentioned.

Mr. Dix, on behalf of Henry Wemys, the representative of the survivor of said trustees, and to whom the Remembrancer had reported the said sum of £2,000 due, applied now for his costs in the cause.

Mr. Pakenham, for the inheritor, *contra*.—This person cannot have his costs, as, according to the settled rule of this Court, only one set of costs is allowed in a foreclosure suit to be charged against the inheritance. In Chancery it is otherwise, but the rule of this Court would appear to be the just one; as, otherwise, the whole estate might be swallowed up in costs.

Mr. Dix, in reply.—There could be no doubt of the right of this defendant to his costs in Chancery, and there is no difference as to his right here. It is a favor allowing a mortgagor to come in at all, as, after the day named for payment having passed, the estate becomes the property of the mortgagee, whose strict right is to foreclose the land;

In a suit to foreclose a mortgage, after the death of the mortgagee, it appeared that the mortgagee had bequeathed the mortgage debt in different portions to several persons, and amongst those £2000 had been bequeathed to A. and B., and the survivor of them, his executors, &c.; the personal representative of the survivor had been made a defendant, and £2000 was reported due to him: *Held*—That he was entitled to be paid his costs according to the priority of his demand, notwithstanding that the general rule of the Court in foreclosure suits was to allow only one set of costs against the inheritance.

1840.

CANE
v.

BROWNRIGG.

and under this state of facts, it would be hard to say, that a party to whom the mortgagee has bequeathed a part of the debt, and who is a necessary party, should not get his costs.

Mr. *Crawford*, for the plaintiff, admitted the rights of Mr. *Wemys*, and that he was entitled to his costs according to his priority, but not until after payment of the plaintiff's claims, which were reported to be prior to his.

PENNEFATHER, B., said the general rule of this Court in foreclosure suits was as Mr. *Pakenham* had had stated; but, under the peculiar circumstances of the case, decreed that the defendant should have his costs in the cause according to the priority of his demand.

Thursday, June 25th.

INJUNCTION—WASTE—ANCIENT MEADOW—TENANT FOR LIFE.

DAVIES v. DAVIES.

Where a bill by the person next in remainder charged that the tenant for life, who was punishable of waste, and who had power to make leases not punishable of waste, had demised a part of the lands to a third person, and that such person, in collusion with the tenant for life, was committing waste, by turning up, tilling, and burning the land, and the defendant admitted the turning up, &c. but stated that it was land which the tenant for life had reclaimed and laid down in grass about thirty years before, the Court refused a motion for an injunction.

THE bill in this case was filed for an injunction to restrain waste. It appeared by the bill, and the affidavit to verify, that *Netterville Davies*, one of the defendants, being seized of the lands of *Kentstown*, in the county *Galway*, in fee-simple, in the year 1810, upon the occasion of his marriage, they were by deed of settlement settled upon himself for life, with remainders to the issue in tail male, with power to lease for certain lives or years, and "so as such lease or leases be not made punishable of waste;"—the bill then stated, that there was issue of this marriage, *Geoffry Davies* (the plaintiff), who is the eldest son and heir-at-law of the said *Netterville Davies*, and, besides several other children, the defendant *Thomas Davies*, who is the third son of the said marriage;—that upon the 5th of July 1838, the defendant *Netterville* demised a certain portion of said lands to the defendant *Thomas*, and that plaintiff was induced by misrepresentations to be an executing party to said demise, but the validity of which he impeached: that the defendant *Netterville*, who has the power of committing waste, being in collusion with *Thomas*, had joined him in turning up, burning, and tilling the said lands; and that the said *Thomas* did turn up, burn and till the said premises, which were ancient meadow and pasture land. In the

Semble—That such pasture is not ancient meadow or pasture.

answering affidavits the defendants stated, that the only part of the lands in the possession of Thomas which had not been used in tillage many years, was the lawn, being about six acres, which was first reclaimed and laid down in grass about thirty years ago by the said defendant Netterville, and that he obtained leave in 1839 from the defendant Thomas to grow potatoes in about three acres of it, in order to improve it; the defendants further admitted, that in addition to the three acres so broken up, they were about to burn another small portion of said lands; they denied that any portion of these lands was ancient pasture, or that there was any collusion between them to injure the plaintiff.

1840.

DAVIES
v.
DAVIES.

Mr. *Hamilton Smythe* now applied for an injunction upon the plaintiff's bill and affidavit, and relied upon the admissions in the affidavits of the defendants that the three acres had been in pasture for thirty years, which, upon the authority of many decided cases, impressed upon the land the character of ancient pasture; *Hunt v. Brown* (a); *Martin v. Coggan* (b); *Morris v. Morris* (c).

Mr. *James Blake*, Q. C., *contra*.

PENNEFATHER, B.*

The defendant Netterville Davies only admits in his answer that he reclaimed this land and made it pasture land about thirty years ago; and we all know that such land is very likely to become marshy again. I do not think such land can be considered ancient meadow. I am bound also to consider this motion, as Mr. *Blake* has contended, to be substantially a motion to restrain the tenant for life, who is dispunishable of waste. Upon these grounds I must refuse this application.

Injunction refused.

(a) 1 Sausse & S. 179; S. C. 5 Law Rec. N. S. 130.

(b) 1 Hog. 120.

(c) 1 Hog. 238, 241.

* *Solus*.

*Friday June 28th.***PRACTICE—RECEIVER, VACATING HIS RECOGNIZANCE—
INJUNCTION.****ANONYMOUS.**

Where it appeared that the receiver had passed his final account in 1829, when there was a small sum due to him; that the purchaser under the decree in the cause was put into possession the same year; and that the receiver had not received any of the rents since his last account; the Court granted an order to vacate the receiver's recognizance although the receiver had not been formally discharged.

MR. BURROWS applied on behalf of one of the sureties of the receiver in this cause to vacate the receiver's recognizance. It appeared that the recognizance was entered into in the year 1826; that the receiver passed his final account in the year 1829, when there appeared to be £8 due to him; that the purchaser under the decree in the cause was put into possession in the same year; and that the receiver had not received any of the rents since his last account.

The Court had granted a conditional order for this purpose last Term, which from some irregularity the Court could not now act upon; but **Mr. Burrows** submitted that he was entitled to an absolute order, upon the ground that the injunction to put the purchaser into possession amounted to a discharge of the receiver.

PENNEFATHER, B.

I think it does; and upon this ground, let the recognizance be vacated.

Motion granted.*

The injunction to put the purchaser into possession amounts to a discharge of the receiver.

* In *Pensonby v. Pensonby*, 1 Hogan 321, the late Master of the Rolls held that the injunction to put a purchaser into possession is, *ipso facto*, a discharge of the order appointing a receiver over the lands mentioned in the injunction.

*Friday, June 26th.***PRACTICE—NOTICE—MONEY MOTION.****O'FERRALL v. MADDEN.**

A notice of a money-motion moveable the last of the eight equity days is too late; it must be served in time to be moved the last day—but one

MR. M'CAUSLAND applied to draw money out of Court pursuant to the Remembrancer's report; the notice was dated the 23d of June.

PENNEFATHER, B.

This notice is late; a motion of this kind ought to be moveable yesterday; I cannot, therefore, hear this motion.

No rule.

Friday, June 26th.

PRACTICE—NOTICE—MONEY MOTIONS.

ANON.

MR. T. K. LOWRY made a similar application under the same circumstances, but grounded upon the consent of all the parties interested in the funds, which he submitted would take his case out of the rule.

PENNEFATHER, B., refused the motion, the application in all such cases must be on petition.*

consent of all the parties interested in the funds will not vary the rule.

A notice of a money-motion moveable the last of the eight days of Term is too late; it must be served in time to be moved the last day but one of Term; and the

* See note to *ANON.* 4 Law Rec. N. S. 31.

Friday, June 26th.

PRACTICE—MONEY MOTIONS.

ANONYMOUS.

MR. FEARON applied in this case, *while the* Court was hearing money-motions, for an order upon the receiver to pay over to the applicant a certain sum then in his hands, and no person appearing to oppose the motion it was granted.

Mr. *Radcliffe* subsequently stated that he had a brief to oppose the motion, but finding the Court occupied with money-motions, and not conceiving the present to come within that class, he was absent when it was moved.

PENNEFATHER B.

Strictly speaking, this motion is not a money-motion, within the rule regulating the moving of money-motions; I will, therefore, hear the motion again.

A motion for an order upon a receiver to pay over a certain sum in his hands, is not strictly a money-motion, therefore, where such a motion was moved when the Court were in money-motions, in the absence of counsel who had a brief to oppose it, the motion was reheard.

*Friday, June 26th.*PRACTICE—COSTS—SEQUESTRATION—PERSONAL
PROPERTY.

O'BRIEN v. FOLEY.

Upon an application for liberty to issue a sequestration for the costs of dismissing a bill, if the party be going against personal property, notice of the motion need not be given: *Secus*—where the party is going against real property.

Mr. ROLLESTON applied for liberty to issue a sequestration against the plaintiff for the costs of dismissing a bill.—[*Per Curiam*. Is there notice of this application?—The affidavit states that the property against which we are going is personal, and that it is not intended to interfere with any real property. Under these circumstances, if notice be given, the party will remove the goods.

Upon these grounds the Court granted the application.

Motion granted.

*Monday, June 29th.*PRACTICE—AFFIDAVIT—RECEIVER UNDER SHERIFFS
ACT.

In re ———.

The affidavit upon which it is sought to obtain a receiver under the sheriffs' act must state expressly when the judgment is revived; it is not sufficient to state that the petitioner is entitled to sue out an *elegit*.

Mr. BRADDELL applied for a conditional order for a receiver under the sheriffs' act. The affidavit upon which the motion was grounded omitted to state when the judgment was revived, but it stated that the applicant was entitled to sue out an *elegit*.

PENNEFATHER, B.

The affidavit is insufficient; it must state expressly when the judgment was revived.

Motion refused.*

* See *Anon.* 6 Law Rec. N. S. 307

Monday, June 26th.

PRACTICE—NOTICE—INVESTMENT OF PURCHASE MONEY.

LEE v. POOLE.

MR. GARDE applied for liberty to invest a sum of money, being the one-fourth of the purchase-money in this cause, in $3\frac{1}{2}$ per cent. stock.

A motion to invest the one-fourth of the purchase-money in $3\frac{1}{2}$ per cent. stock must be upon notice.

PENNEFATHER, B., having inquired if notice of the application had been given, and being answered in the negative, said that he could not grant the application, as it was not a motion of course.

Motion refused.

Monday, June 29th.

PRACTICE—EVIDENCE—SUPPRESSAL OF DEPOSITIONS.

O'HARA v. CREAGH.

MR. COLLINS, Q. C., moved to suppress depositions, the interrogatories being wrongly entitled. The title of the cause was *O'Hara v. Pierce Creagh, Francis Martin and Patrick Flynn*, and the interrogatories were entitled *O'Hara v. Pierce Creagh, Francis ——— and Patrick Flynn; Perry v. Silvester (a); White v. Taylor (b); Curre v. Bowyer (c).*

Depositions wrongly entitled cannot be read, but the party who seeks to use them will be allowed to have them re-sworn upon terms.

Mr. James O'Brien, *contra*.

PENNEFATHER, B.

I apprehend that the depositions could not be read, or the party who made them indicted for perjury; perhaps they might be amended.*

No rule upon this motion, defendant undertaking to pay the costs of this motion, and that the witnesses shall be re-sworn before the Examiner before the 1st of October; and if not, let the depositions be suppressed.

(a) Jac. 83.

(b) 2 Ver. 435.

(c) 3 Swans. 357.

* Depositions amended in *McClennahan v. Magee*, 2 How. E. E. 636.

Friday, June 12th, and Saturday, June 20th.

FRAUDULENT CONVEYANCE—GUARDIAN AND WARD—CONVENT.

WHYTE v. MEADE and others.

Where A. being about 18 years of age, and possessed of considerable real and personal property, entered a convent, whether as postulant or pupil was controverted, but upon an agreement on the part of the nuns that she should not be professed under age, or without their apprising her friends previously; and it appeared that she was professed under age, and in the absence of all her friends; and there was no evidence of any notice having been given to any of them, save an allegation in the answer of the defendants, that they did communicate the fact to her sister; and afterwards, when she arrived at full age, she assigned nearly all her property to the nuns, for the benefit of the convent; and it appeared that previous to this she had been excluded

THE bill in this cause was filed against Elizabeth Meade, Mary Anne Maxey, and Catherine Mary Dolan, members of the Ranelagh Convent, and others (plaintiff's sister and children, who were friendly parties); for the re-conveyance of the lands of Woodpark and Tudder, formerly conveyed by the plaintiffs to the principal defendants, and also to compel them to transfer so much $3\frac{1}{2}\%$ *cent.* stock, as would be equivalent to the stock in the bill stated to have been transferred by the plaintiff for the use of the said defendants.

From the pleadings and proofs in the cause, it appeared that the plaintiff, in 1825, being then eighteen years of age, went to reside at Ranelagh Convent, whether as a postulant for the order of nuns residing therein, or as a pupil, was controverted; but it was clearly proved, that her friends were very averse to her becoming a nun; and the bill charged, and some witnesses deposed, that the said defendants, in order to induce them to agree to plaintiff's residing in the nunnery, expressly promised she should not be professed until after she attained the age of twenty-one years, and that her friends should be apprised previously, and that it was upon this express condition the consent of her friends was obtained; that it was agreed she should pay £600 for all her expenses in the convent for her life, if she should remain; that in 1827 the defendants induced her to become a nun under twenty-one; and in the absence of, and without apprising her friends, that she was professed privately in the evening; but plaintiff admitted she was then willing to become a nun; that being under age, the £600 was not paid, but that £40 a-year was paid until 1829, when £1000 $3\frac{1}{2}\%$ *cent.* stock was transferred by her for the use of the said defendants; that in March 1829, being very ill, she was induced to make over her real property for the benefit of the society; and accordingly, by deed of lease and release, she granted to these defendants the lands of Trudder and part of the lands of Woodpark, for her interest therein, upon trust as to the latter, for the use of the society, and as to the former, for herself for life; and after her death, upon trust, that the said defendants should retain for said society £17 *per annum*, and pay the residue to her sister and her sister's

from the society of her friends, and that the deed for this purpose was prepared by the professional agent of the convent, and that she had no friend of her own present; and having in some time after quitted the convent, she filed a bill to set those proceedings aside, for a reconveyance of her real estate, and for an account: *Held*—That the transactions in this case fell within the principle of the cases of guardian and ward, which decide that dealings between them ought not to stand. Decree accordingly.

children, the other defendants in the cause; that upon this occasion Terence Dolan, the attorney of said society, and the brother of the defendant Catherine M. Dolan, prepared said deed, and plaintiff had not the assistance of any professional friend, although one John Mills was at this time her attorney. She admitted she privately left the convent in 1827, and after remaining with her friends a week, voluntarily returned to the convent. The bill further charged, and evidence was given in support of the allegation, that plaintiff was excluded from the society of her friends; that she finally quitted the convent in April 1836, and had been since in receipt of the rents.

The defendants, in their answer, denied the agreement not to profess her until she attained the age of twenty-one; insisted that they wrote word to her sister in time to be present at the profession, or to have interfered to prevent it, and did not write to her other friends, because plaintiff did not express any wish that they should do so; and relied upon the statute of limitations in bar of the account; that the cause of refusing some of her friends was, that they had assisted her in privately withdrawing from the convent; and as to others, that by the rules of the convent, only certain days were set apart for receiving visitors, and all persons calling on the other days were excluded.

Mr. Dolan, in his depositions, proved that he had been employed by the plaintiff as her attorney, at least four times since she came to reside at Ranelagh, in the management of her property, and specified the occasions; that plaintiff was not under any restraint of any person whatsoever; that she communicated to him fully and freely her own free and unbiassed wishes respecting such professional business; that Mr. Mills during this time acted for plaintiff's sister, and not for the plaintiff. In further depositions on the part of the defendants, it was stated that they always treated the plaintiff with great kindness and attention; that they never endeavored to induce her to dispose of her property contrary to her own inclination; that the cause of excluding her friends was, that visitors are only admitted on certain days by the rules of the society; and that she stated, on her return to the convent, that while away, a Mr. Meekings proposed to marry her.—[This was a principal witness in support of the allegations in the bill.]

Messrs. *Blackburne*, Q. C., and *Smith*, Q. C., with whom was Mr. *W. Griffith*, relied upon *Huguenin v. Basely* (a); *Hinton v. Hinton* (b); *Norton v. Relly* (c); *Dent v. Bennett* (d); *Revett v. Harrey* (e); and 1 *Storey's Equity Jurisdiction*, 256, 258.

(a) 14 Ves. 273.

(b) 2 Ves. sen. 631, 635; S. C. Amb. 277.

(c) 2 Eden, 286.

(d) 7 Sim. 532, 546.

(e) 1 Sim. & S. 502.

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Serjeant *Greene* and Messrs. *Dickson*, Q. C., and *Malay* cited *Pratt v. Parher* (a); *Hunter v. Atkins* (b); *Evans v. Bicknell* (c); *Sturt v. Mellish* (d); and *Batty v. Lloyd* (e).

PENNEFATHER, B.

In the year 1825, this young woman, the plaintiff in this cause, entered into the establishment of the defendants as a lodger, and unquestionably not as a person who had irrevocably bound herself to take the veil. That this was so is quite manifest, independent of the express evidence of what was stipulated at the time she entered the convent. And what is that which was so stipulated, and which ought to be done without express arrangement? namely, that she was not to be professed until she attained the age of twenty-one; nor even then without communicating with her friends; that is the evidence of one of the witnesses (Mr. Henry); it is not denied, nor can there be a doubt thrown upon it. Under that stipulation she entered the convent, and it was further agreed that she was to pay £40 a-year until she took the veil, and £600 afterwards; the defendants have no pretence to claim the £600 until she took the veil. When the case, therefore, is put upon contract, there is no foundation for it;—the contract was violated in every material point by the defendants; because the plaintiff took the veil, and we must suppose by the influence of the defendants, while she was under age—contrary to the duty of the defendants—even without any agreement upon the subject—but also in direct violation of the express agreement they entered into with the plaintiff and her friends. In February 1827 she remains under the same influence, it must be supposed; which, give me leave to say, is incontestably proved by her having taken the veil; and so she continues until 1829, when she becomes unwell. Her brother-in-law is denied access to her; her sister is allowed to see her, but never without a member of the convent being present; and in such circumstances as these she transfers £1100 to the defendants, and the whole of her real estate, with the exception of some small portion of it, which she gave to her relations. Can it be seriously said that a transaction like this ought to stand? that a deed executed by a person placed at a convent like this person—placed in a situation where that undue influence is more likely to be exercised than in any other, which Courts of Equity should interfere to prevent; and shall it not be presumed, beyond almost a doubt so strong as not to be rebutted, that the documents in question were executed by the plaintiff under undue influence. But that is not

(a) 1 Sim. 1; S. C. 4 Russ. 507.

(b) 3 Myl. & Kee. 113, 133.

(c) 6 Ves. 183.

(d) 2 Atk. 610.

(e) 1 Vern. 141.

all; the deed was got up by Mr. Dolan, the professional friend of the convent, without the presence of any professional friend, or of any friend at all, of the infant; and this gentleman takes upon himself to swear that these ladies are so incapable of erring, that all this young woman has done, was done without the slightest influence having been exercised over her—the spontaneous effusion of her own mind! When we find him thus volunteering to swear what the Searcher of Hearts alone could tell, is it not plain that he gave his heart and mind, not to the unfortunate victim upon whom he was about to practice as far as he was able, but to the defendants in this cause? He is not called upon to say whether the deed was technical or not, or whether counsel saw it; we do not want to know what the plaintiff said to him; what we seek to know is this, if she had an intention to make this disposition of her property, how it was produced? And no man can doubt that it was produced by the influence of these ladies over a young person, secluded from every friend; her nearest relatives excluded from her. Can we hesitate for one moment to believe that the intention was produced by an exercise of influence on the part of those who ought not to be engaged in secular pursuits, but ought to have been devoted to the instruction of the plaintiff's mind? Upon the whole we think, without any doubt, that we ought to decree a re-conveyance of these premises, and the account sought for by the bill.

RICHARDS, B., concurred.—It was unnecessary to say more after the judgment of his Brother PENNEFATHER, than that in his opinion this case falls expressly within the cases of guardian and ward, and was governed by them.

Decree accordingly.

Monday, June 22d.

PENNEFATHER, B., this day stated that in their judgment in this cause the Court did not intend to lay down any general rule; but that the particular circumstances of this case brought it within that class of cases which decide that transactions like those disclosed in this case ought not to stand. There are cases in which dealings between guardian and ward are upheld, but it lies upon the party seeking to uphold them to prove that such transactions have been *bona fide*.

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Saturday, June 27th.

CONSTRUCTION OF WILL—LEASE OF LIVES
RENEWABLE FOR EVER.

KIRBY v. O'HEA.

Where a testator devised to trustees his "estate and interest" in farms of which he was seized for lives renewable for ever, in trust, after paying certain annuities, &c., to permit and suffer his nephew A. to enjoy the same for his life; and from and after his decease, to permit such son of his as should attain the age of 21 to enjoy said lands, and on failure of such remainder to his nephew B., for his life, remainder to his first son as before: *Held*—that a son of A.'s who attained the age of 21, and died in the lifetime of his father, took the absolute interest in these premises.

THIS was a motion to confirm the Master's report in this cause, whereby he declared that certain persons were entitled to the residue of the funds then in bank to the credit of the cause.

The question arose upon the construction of a passage in the will of Nicholas Stout, whereby he devised to trustees, and to the survivor, &c., of them, "his estate and interest" in the farms of Two-mile-bridge, Ballynock and Corbally (of which he was seized for lives renewable for ever), upon trust, after paying certain annuities, debts, and legacies therein mentioned, to "permit and suffer" his nephew Nicholas Stout Hayes to enjoy the said farms, subject to the rent and fines payable thereout for the term of his natural life, and from and after his decease (subject as aforesaid), to permit such son of his body as should first attain to the age of twenty-one years to enjoy said lands; and on failure of such issue, remainder to his nephew Stout Hayes, for the term of his life, remainder to his first son that should attain to the age of twenty-one years; and on failure of such issue, remainder to his nephew John Hayes, for the term of his natural life, remainder to his first son that should attain the age of twenty-one years; and on failure of such issue, remainder to his nephew James Hayes; remainder over. In a previous part of his will, in devising a fee-simple-estate, the testator used the same language.

In this case the bill had been filed for a sale, to pay off certain charges affecting the above lands, and after a sale and paying off all the demands, £309 remained to the credit of the cause, and this sum was the subject of the reference out of which the present question arose.

It appeared in the cause, that the said Nicholas Stout Hayes (otherwise O'Hea), entered into possession of the above farms, and so continued until he died in May 1828; that he had one son, Nicholas Stout O'Hea the younger, who died in the lifetime of his father, and one daughter, Letitia O'Hea, the late wife of the defendant George Kirby, by whom she had three daughters, two of whom were now alive, and who claimed this residue as heiresses-at-law of Nicholas Stout O'Hea the younger.

John O'Hea, the eldest son of the said Stout Hayes, otherwise O'Hea, claimed also to be entitled to the said residue under the limitation to his father in the will of the said Nicholas Stout.

Serjeant *Greene*, for the heiresses-at-law of Letitia O'Hea, otherwise Kirby.—If, in this case, the first tenant for life had a son who attained twenty-one, he would take the absolute interest in these premises, although there are no words of inheritance. Where a limitation over is only given in the event of the first taker dying under twenty-one, the Courts hold that he takes the absolute interest upon the ground that the limiting the estate over, only in the event of his dying in his minority, shewed that the testator's intention was, that it was not to go over if he attained his full age; *Frogmorton v. Holyday* (a); *Doe d. Wight v. Cundall* (b); *Goodtitle d. Hayward v. Whitby* (c); *Purefoy v. Rogers* (d); *Marshall v. Hill* (e); 2 *Powell on Dev.* 395; the same principle is established in *Doe d. Elmore v. Coleman* (f), upon the ground of the manifest intention of the testator. If this were a case of fee-simple-estate, it would be clear upon the authorities that Nicholas Stout O'Hea took the absolute interest.—[PENNEFATHER, B. The case of an estate *pour autre vie* is *a fortiori*; in the devise of his simple estate he uses the same language; and if he meant thereby to give the fee it is a strong presumption, that in the devise under consideration he meant to give the absolute interest in these premises.]—If then the first son who attained twenty-one of the first tenant for life would take the absolute interest, it is decided that where a person devises to an individual of a class, the Court, inferring uniformity of intention, will give to any one of that class the same estate given to that individual; *Wright v. Bond* (g); *Doe d. Orpha v. Frost* (h); and it is plain that, in the present case, the testator did not intend to make any distinction. He meant that the whole estate should vest in the first son who attained twenty-one; he gives leasing powers and jointuring powers only to the nephews, and not to the sons; and the word “remainder” which he has used, is sufficient to give the absolute interest to such son; *Norton v. Ladd* (i); *Bailis v. Gale* (k).

Mr. *Collins*, Q. C., *contra*, contended that the limitation to the son was contingent upon his living at the time of his father's death: that the word “son.” was a word of limitation and not of purchase; and that upon the authority of *Robinson v. Robinson* (l); *Mellish v. Mellish* (m); and *Campbell v. Vaughan* (n); either the father or the son took an estate in tail male;

(a) 3 Barr. 1618; S. C. 1 W. Bl. 535.

(b) 9 East, 400.

(c) 1 Barr. 228, 234; S. C. 1 Ld. Ken. 506.

(d) 2 Saund. 388, c.

(e) 2 Maule & S. 608.

(f) 6 Price, 179.

(g) 2 N. R. 125.

(h) 1 B. & C. 636; S. C. 2 D. & R. 678.

(i) 1 Lutw. 755.

(j) 2 Ves. sen. 48.

(l) 2 Ves. sen. 225; S. C. 1 Barr. 38.

(m) 2 B. & C. 520; S. C. 3 D. & R. 804.

(n) Loft. 267.

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and in either of these events, the children of Letitia O'Hea would not be entitled to the surplus in bank. As to the difference between devises of leases for lives renewable for ever, and estates in fee, he referred to *Doe v. Robinson*. (a)

Serjeant *Greene* replied.

PENNEFATHER, B.*

I concur in Serjeant *Greene's* construction of this will. The testator gives to the trustees all his interest in this property, and all the subsequent words must refer to what he gave these trustees. I, therefore, think that the son who attained twenty-one was to take a *quasi* fee, because the whole estate was given indefinitely to the trustees, and the devise to such son was a designation of the use of that which was given to the trustees. It was given to the first son of the nephew who attained twenty-one, and was not given over in any event, but on the son's not attaining twenty-one. The authorities cited by Serjeant *Greene* are conclusive, and I agree with the Officer, that the entire interest in the lands in question vested absolutely in the son who attained twenty-one.

(a) 8 B. & C. 296.

* *Solus.*

Tuesday, June 30th.

PRACTICE—SALES JUDICIAL—PURCHASER'S RIGHTS—RENTS.

VINCENT v. THWAITES.

Where the lands were sold under a decree upon the 30th of April 1840; one-fourth of the purchase-money deposited; a conditional order to confirm the sale, and subsequently the remaining three-fourths lodged in bank to the credit of the cause, all upon the following day, and the order to confirm the sale

made absolute on the 12th of May—*Held*, that the purchaser was not entitled to the rents from the 1st of November, the gale-day next preceding the day of sale.

In this case there was a decree for a sale, and the lands were set up upon the 30th of April 1840, and Joseph Gore being the highest bidder was declared the purchaser; upon the 1st of May the one-fourth of the purchase-money was deposited in bank, under the certificate of the Remembrancer, and upon the same day an order was obtained for confirming the sale; the purchaser subsequently, on the said 1st of May, obtained the certificate of the Remembrancer to lodge the remainder of the purchase-money in bank, and accordingly lodged same to the credit of this cause upon the 12th May,—the order for confirming the sale was made absolute. Upon these facts, the purchaser applied for an order upon the receiver to pay to him the rents which became due since the 1st of November 1839, being the gale-day next preceding the day upon which the sale took place.

Mr. Gayer, for the purchaser, applied for a declaration to the Officer, directing him to allow the rents in question to the purchaser, in making up his allocation report. He relied upon *Scott v. Rothe* (a), and *Montgomery v. Cosslett* (b) : in the latter case the late Chief Baron said, it must be considered as analogous to the case of an actual conveyance executed to the purchaser when he paid the purchase-money into Court. If such conveyance had been executed, it is clear that he would be entitled to these rents.

Mr. Fitzgerald, contra.

PENNEFATHER, B.

According to the settled practice of this Court, the three-fourths of the purchase-money cannot be paid in until the sale is confirmed ; and in this view I adopt the language of the Lord Chief Baron in *Montgomery v. Cosslett*, that where a purchaser is entitled to the conveyance he is entitled to every thing. The question raised in this case could not regularly occur in this Court, because the three-fourths cannot be paid in until the sale is confirmed ; there must be both confirmation of the sale, and payment of the purchase-money, but after that the purchaser has a right to consider that what ought to be done, is done. That is the principle of this Court, but these two things must be done. Would it not be a monstrous absurdity that the applicants should be entitled to these rents, and yet that the lands might be set up and sold to another ? Our practice is as I have stated ; it is otherwise in Chancery ; I must, therefore, refuse to make the declaration required, and declare that the purchaser is not entitled to these rents.

Motion refused.

(a) C. & Dix, 621 ; S. C. 1 Ir. E. R. 105 ; S. C. 4 Law. Rec. N. S. 213.

(b) 2 Jones, 177.

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In the Exchequer the three-fourths of the purchase-money cannot be paid in until the sale is confirmed. *Secus* in Chancery.

Wednesday, June 24th.

MORTGAGE—REDEMPTION—JUDGMENT—PRIORITY.

JOHN PERROTT v. JOHN O'HALLORAN and JOHN MITCHELL, assignee of
MICHAEL CLANCHY, an Insolvent Debtor.

In the Court of Equity Exchequer, a *puisne* mortgagee need not, in a bill for foreclosure and sale, offer to redeem a prior mortgage; the *puisne* mortgagee may insist on the sale, and the prior mortgagee cannot resist it, but the prior mortgagee must be paid his debt and costs of suit first. If, however, there be a judgment or other incumbrance prior to the first mortgage, such prior incumbrance must be paid out of the purchase-money, and that in priority even to the prior mortgagee: and this rule holds good, even though such judgment or other prior incumbrance happens to be vested in the *puisne* mortgagee who files the bill for a foreclosure and sale. In the Court of Chancery, the *puisne* mortgagee must by his bill offer to redeem the mortgage.

THIS was a bill for a foreclosure and sale. The cause had been first heard on the 6th of February 1838, before Baron RICHARDS, and a decree to account was then pronounced.

The bill (which was filed on the 18th of December 1836) charged, that in Trinity Term 1834, the plaintiff obtained a judgment on a bond and warrant of Michael Clanchy for the penal sum of £600, conditioned for the payment of the principal sum of £300, with interest; that on the 25th of April 1835, Clanchy being indebted to the plaintiff in the further sum of £157, executed to him a mortgage of certain freehold premises in the bill mentioned for £457, the mortgage being (and so the deed expressed it to be) an original security for the £157, and an additional and *collateral security* for the former sum of £300, with interest. The bill further charged, that on the 9th of October 1834 (immediately between the entry of the plaintiff's judgment and the execution of the mortgage of the 25th of April 1835), Clanchy had executed to the defendant O'Halloran a mortgage on the same premises for £100; and that in Easter Term 1835, the defendant O'Halloran had obtained a judgment against Clanchy for £100; and that on the 1st of August 1835, Clanchy was discharged as an insolvent debtor, and that John Mitchell, the other defendant, was the provisional assignee.

The bill prayed an account of the sums due on the two mortgages and on the plaintiff's judgment; also an account of all incumbrances prior to or cotemporaneous with the mortgages and the two judgments of Trinity 1834 and Easter 1835, and that the nature and properties of the incumbrances may be ascertained and reported; and it prayed payment of the plaintiff's mortgage and judgment, and in default of payment, it prayed a foreclosure of the two mortgages, and a sale for payment of the mortgages and the judgment of Easter 1834, and of all incumbrances, according to their respective priorities; it prayed also a receiver.

The insolvent Clanchy was alive, but was not made a party to the bill.

On the 10th of June 1837, Mitchell filed his answer, admitting that Clanchy presented his petition to be discharged under the provisions of the insolvent act, and that he at the same time executed the usual assignment of all his estate and effects to the defendant as provisional assignee, and that he was discharged as an insolvent debtor; and the defendant further admitted that he the defendant had not executed any

assignment of the insolvent's said estate to any other assignee, and that the same still continued vested in the defendant as such provisional assignee. He said he had no beneficial interest in the estate, that he held it merely as an Officer of the Insolvent Debtor's Court, and that he was willing to submit to any decree this Court should be pleased to make.

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The defendant John O'Halloran had filed his answer on the 29th of April 1837, admitting the principal facts charged by the bill; but he stated that the plaintiff's mortgage comprised certain premises that were contained in the defendant's prior mortgage of the 9th of October 1834; and he insisted that the plaintiff was not entitled to a foreclosure and sale, unless he was willing to redeem the defendant's prior mortgage, and also to pay the defendant his costs of suit. The defendant further insisted, that as the plaintiff's mortgage included property not contained in the defendant's mortgage, there was the less reason for the Court interfering to disturb the priority which the defendant's mortgage gave him at law.* The defendant further insisted that the plaintiff's claim as a judgment creditor sank in the subsequent mortgage of the 25th of April 1835,† and therefore lost its priority (if it ever had any) as against the defendant's mortgage of the 9th of October 1834.

Issue having been joined, a consent was entered into by all the parties in the cause, that the two mortgages and the two judgments should be admitted without any proof; and on the 6th of February 1838 the cause was heard on the pleadings and the consent.

Mr. Bennett, Q. C., and Mr. R. D. Kane, for the defendant O'Halloran.—The bill must be dismissed, because it does not contain any offer to redeem the prior mortgage. The defendant O'Halloran has the legal estate; he is willing to rest upon his security at law; he is not seeking for any relief in a Court of Equity. The plaintiff's judgment of Trinity, 1834 does appear, to be sure, to be the first incumbrance, being prior in point of date even to O'Halloran's mortgage (of 9th of October 1834); yet, as the conuzor is alive, the plaintiff, the conuzee of that judgment, cannot, as a mere judgment creditor, file a bill for a sale. The only ground on which the plaintiff can pray a sale is, that he holds the mortgage of the 23d of April 1835; but this is *paisne* to the mortgage of the 9th of October 1834: and a Court of Equity ought not to disturb the defendant's right under that mortgage. In the

* It was admitted at the final hearing that the value of these additional premises was inconsiderable.

† The mortgage deed shewed clearly that this was not the inten-

tion of the parties, for the mortgage was stated expressly to be an additional and collateral security for the prior debt; and this point was given up at the hearing.

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Court of Chancery, a demurrer would lie to a bill of this kind, filed by a *puisne* mortgagee, not offering to redeem the prior mortgage. *M'Donnough v. Shewbridge* (a); *Woodburne v. Harrington* (b); and if the defendant, in his answer, alleges that any sum whatever is due to him on foot of his prior mortgage, that Court would not allow the plaintiff to proceed one step farther, until he pays off this sum which is due to the prior mortgagees.

Mr. Cooper, Q. C., and Mr. O'Leary, for the plaintiff.—The practice of the Court of Exchequer is different from that of the Court of Chancery in bills of this kind. In the Court of Exchequer, a demurrer will not lie, even though the bill does not offer to pay off the prior mortgage.* The *puisne* mortgagee is in this Court allowed to proceed to a sale, and the prior mortgagee is paid out of the proceeds according to the priority of his demand: but he cannot stop the sale.

RICHARDS B.—The practice of this Court is certainly different from that of the Court of Chancery, in the case of a bill filed by a *puisne* mortgagee. The plaintiff is entitled to have an account of what is due on his own mortgage and an account of prior incumbrances. The prior mortgagee must in this Court submit to a sale: but his debt and his costs of suit are to be paid out of the proceeds, in priority to the plaintiff's demand on foot of the *puisne* mortgage.

The COURT then directed the Remembrancer to take an account of what is due to the defendant John O'Halloran for principal, interest, and costs, on foot of the mortgage of the 9th of October 1834, in the pleadings mentioned—and also of what is due to the plaintiff for principal, interest, and costs on foot of the mortgage of the 23d of April 1835 in the pleadings mentioned, and also to take an account of all charges and incumbrances affecting the said mortgaged premises in the pleadings mentioned, prior to the said several mortgages or either of them, and to report the nature, priority and amount thereof, and what is due thereon. On the consent of all parties a receiver was appointed, at the time of making this decree to account.

On this decree the parties went into the office. The report of the second Remembrancer was signed on the 15th of June 1840, and on the 18th of June, there was an order on consent that the report should stand confirmed forthwith, and that the cause should be set down for a final hearing on report and merits, on the 5th of the eight days after the then Trinity Term. And accordingly on this day, the 24th of June

(a) 2 Ball & B. 561.

(b) 4 Law Rec. N. S. 69, 190.

* See *Toome v. Hamilton*, 5 Law Rec. N. S. 189; *Crofts v. Poe*, 1 Jones, 544. See also *Attorney-General v. Redmond*, 2 Jones, 257.

1840, the cause came on for a final hearing on report and merits. The report set forth the charges in the following order of priorities :

First—A sum of £60. 11s. 2d. paid by the plaintiff, between May 1836, and June 1837, for head-rent and taxes due out of the mortgaged premises. Second—A sum of £5. 10s. paid by the defendant John O'Halloran in 1831, for head-rent due out of the mortgaged premises. Third—A sum of £407. 10s. 11d. due to the plaintiff for principal and interest, on his judgment of Trinity Term 1834. Fourth—A sum of £134. 1s. 4d. due to the defendant John O'Halloran, for principal and interest on foot of his mortgage of the 9th of October 1834. Fifth—Two sums of £134. 3s. 4d., and £132. 19s. 8d., due on foot of two judgments obtained in Easter 1835, against Clanchy the insolvent; one by the defendant O'Halloran, and another by one Francis Connell Fitzgerald—and these two judgments were reported to be of equal priority.* Sixth—The sum of £612. 1s. 9d. including the before mentioned sum of £407. 10s. 11d. (No. 3.) due on foot of the plaintiff's mortgage of the 29d of April 1835.†

On this report, Mr. Cooper, Q. C., with whom was Mr. O'Leary, prayed a sale and payment *according to the priorities set forth by the Second Remembrancer*.—[PENNEFATHER, B. Is there any exception to the report?—No; the report stands confirmed by the order of the 18th: it states the priorities, and there is no exception taken.

Mr. Bennett, Q. C., with whom was Mr. D. R. Kane, for the defendant O'Halloran.—It is true there is no formal exception taken to the report: but from the nature of this case the Court must decide upon the priorities, notwithstanding what appears to be the finding of the Remembrancer. He has stated the priorities as if it were an ordinary creditor's suit, which it is not, upon the face of the report; the plaintiff's judgment of Trinity 1834 stands first in order of priority, yet in this case the Court must look at the nature of the plaintiff's right to the relief sought by the bill, namely a foreclosure and sale and payment. The plaintiff could not as a judgment creditor file a bill for a sale during the life of the conuzor; and so he must be treated in this case as a person having no title to relief, except on the ground of being a mortgagee, and therefore, as his mortgage was *puisne* to that of the defendant O'Halloran, the proceeds of the sale should be applied in the first in-

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* It appeared by the roll that these two judgments were entered in the same Term and on the same day, and there was nothing whereby the priority of the one over the other could be decided.

† It was stated in the report that this mortgage was the sixth incumbrance on the small portion

of the premises comprised in it, and which were not comprised in the mortgage of the 9th of October 1834, and that it was the seventh charge on the portion of the premises which were included in both the mortgages. But it appeared that these *additional* premises were of very small value.

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stance to pay O'Halloran's mortgage debt and his costs. The fund is a deficient one, it will not pay what is due to the plaintiff and defendant. If the plaintiff is allowed to apply the produce of the sale in liquidation of what is due on foot of the judgment of Trinity 1834, the entire funds will be exhausted and nothing left for the prior mortgagee; and in this way the plaintiff will in effect be allowed to sell the estate for payment of a judgment debt in the lifetime of the conusor, although he has filed his bill as a *puisne* mortgagee, and although it was in that right alone that he prayed or could pray the kind of relief sought by this bill. If the plaintiff had proceeded at law upon his judgment, the most he could take would be the rents and profits of the one *half* of the mortgaged premises, and then the other half would have remained for the satisfaction of the defendant's mortgage; and surely the remedy in equity for the judgment creditors ought not, as against the mortgagee, to be more extensive than it is at law. The legal right of a prior mortgagee is never disturbed in a Court of Equity.

Messrs. Cooper, Q. C. and O'Leary, for the plaintiff.—The rule of the Court of Exchequer is, that on a bill of this kind the plaintiff, a *puisne* mortgagee, has a right to sell, and that the prior mortgagee cannot resist a sale. That being the case, it follows that *all incumbrances* prior even to the first mortgage must be paid off, for otherwise there cannot be a sale at all; inasmuch as a purchaser cannot have a good title until the prior incumbrancers are paid off their demand.

PENNEFATHER, B.

The plaintiff in this Court has a right to sell, and the defendant cannot stop him. The judgment, therefore, if prior in point of date to the mortgages, must be paid off first, otherwise there could be no sale; and it is quite immaterial whether the judgment is vested in the plaintiff himself or in any other person. And as to the allegation that we are in this way, as it were, bettering the condition of the judgment creditor, and giving him as against the debtor's estate a right which he had not before, that is not so; for under the sheriff's act, the judgment creditors may have a receiver over the *whole* and not over a *moiety* merely; so that as against the mortgagee the remedy of the judgment creditor is not in reality advanced or extended, by our allowing a sale and payment of the judgment debt, according to its priority in point of time. The order of payment therefore must be this: the plaintiff's judgment and the other incumbrances and charges which are reported prior to O'Halloran's mortgage, are to be paid off first according to their respective priorities, as set forth in the report; then O'Halloran's mortgage is to be paid, and also his costs of suit; then the plaintiff's *puisne* mortgage and his costs of suit; and the several other subsequent incumbrances are to be paid (if the funds reach them) according to their respective priorities. The provisional assignee of the insolvent

Clauchy, did not appear by counsel at the final hearing : but plaintiff's counsel applied that the plaintiff might be allowed out of the fund the costs which he (the plaintiff) had incurred in making the provisional assignee a party defendant. The plaintiff had to pay out of his own pocket the costs of the answer put in by the provisional assignee, and the other costs consequent thereon. The Court thought this application reasonable, the provisional assignee being a proper party to the suit, and it being necessary that he should execute the purchase deed, and accordingly it was ordered that the plaintiff should have these costs out of the fund.*

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It is ordered adjudged and decreed, that the Registrar do now tot up interest on the principal sum of £300 sterling, due to the plaintiff on foot of the judgment in said report mentioned, from the 13th† June 1840 (being the time to which interest is computed thereon in said report), to the 18th of June aforesaid, being the time of the confirming the same; which having accordingly been done in open Court, and the same, amounting to the sum of 4s. 11d., being added to the sum of £407. 10s. 11d. reported due to the said plaintiff on account of said judgment, they amount in the whole to the sum of £407. 15s. 10d.

* As to the plaintiff's general costs it was urged by his counsel at the hearing, that these costs ought to be paid out of the purchase-money arising from the sale of the small lot of premises which were comprised in the plaintiff's mortgage, and were not included in the defendant's prior mortgage : and the Court seemed inclined to make such a direction, but the decree is silent on that point, a sale of the entire of the premises being directed and the purchase-money being made distributable as if each of the mortgages included all the premises. And indeed it would appear to be very unfair to pay the plaintiff any part of his costs out of the produce of the sale of the premises which were comprised in his mortgage and not in the defendant's mortgage ; because that would in effect be to

throw upon the premises included in the defendant's mortgage, the entire amount of the prior judgment, and to leave the plaintiff the security of these additional premises unaffected by the prior judgment, which clearly attached upon all the several lots included in either of the two mortgages. If the two mortgages were the only incumbrances, it might be very proper to direct that the prior mortgagee should have only his own mortgaged premises to answer both his debt and costs, and that whatever *additional* premises were contained in the plaintiff's *puisne* mortgage should stand as a security for the payment of the plaintiff's costs of suit, even though the premises included in the prior mortgage should be insufficient to pay the debt and costs of the prior mortgagee.

† The report was signed on the 15th of June.

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[And so the decree goes on to direct interest from the 13th to the 18th of June, to be totted up on all the other sums found due, except the two sums of £60. 11s. 2d. and £5. 10s.]*

And it is further ordered, adjudged and decreed, that the defendants, or such of them† as ought to do so, do in three‡ calendar months, to be computed from the date hereof, pay unto the plaintiff the sum of £60. 11s. 2d., reported due to him on foot of his cash advances for head-rent and taxes of the mortgaged premises in the pleadings mentioned, with interest on the same from this day. And do also pay unto the defendant John O'Halloran the sum of £5. 10s., the sum reported due to him on foot of his cash advances for head-rent of the said mortgaged premises, with interest on the same from this day. And do also pay to the plaintiff the said sum of £407. 15s. 10d., due to him on foot of said judgment, with interest on the said *principal sum* of £300,|| from the aforesaid 18th day of June 1840, until paid. And do also pay unto the said defendant John O'Halloran, the sum of £134. 2s. 11d.,§ due to him on foot of his mortgage in the pleadings and in the report mentioned, with interest on the same from the 18th day of June 1840, until paid, together with his costs in this cause. And do also pay unto the said defendant John O'Halloran, the said sum of £134. 4s. 11d., due to him on foot of his said judgment, with interest on the said *principal sum* of £100¶ from the said 18th day of June 1840. And also unto the said Francis Connell Fitzgerald, in said report named, the said sum of £133. 1s. 3d., due to him on account of his payment in said report mentioned, with interest on the said *principal sum* of £100

* On principle, these sums ought to carry interest from the times when they were actually paid; but it would seem that the Remembrancer's attention had not been called to the matter.

† Strictly speaking, it was the assignee of the insolvent that ought to pay off the incumbrances: but he had no interest in the property, as it was not worth the amount of the incumbrances.

‡ The Court would, on a proper case made, extend this period of three months; it is quite usual to do so.

|| The judgment being entered for a penal sum, generally double

the amount really due, interest may run on until the principal and interest equals the penalty; but it is not the practice to give interest on the gross sum (*e. g.* the £407. 15s. 10d. in this case) appearing to be due on the judgment at the time of the confirmation of the report. See the next note.

§ Here we see the Court allows interest upon interest (*e. g.* on the £34. 2s. 11d. in this case). The interest runs upon the gross sum appearing due on the mortgage at the time of the confirmation of the report. It is otherwise in the case of a judgment debt. See the preceding note.

¶ See the preceding note.

from the 18th of June 1840, until paid, with costs.* And do also pay unto the plaintiff the balance† of said sum of £600. 14s. 5d., due to him on foot of his mortgage, with interest on the same from the said 18th day of June 1840, until paid, after crediting any payment made on foot of said plaintiff's said judgment of Trinity Term 1834, in said report mentioned. And do also pay the plaintiff, his costs expended by him in the prosecution of this cause. And in default thereof, that said defendants be, and they are hereby absolutely barred, and for ever foreclosed of right, and from all benefit and equity of redemption of and in the said several mortgaged lands and premises in the pleadings in this cause mentioned—and then a sale is decreed. And that out of the produce of such sale, payment be made of the aforesaid sum of £600. 11s. 2d., and £5. 10s.; and plaintiff's £407. 15s. 10d., due on foot of his judgment, with interest; and John O'Halloran's £134. 2s. 11d.,‡ due to him on foot of his mortgage, with interest and costs|| as aforesaid. And also the sum of £134. 4s. 11d., due to John O'Halloran on foot of his judgment, with such interest§ as aforesaid. And also the sum of £133. 1s. 3d., due to Francis Connell Fitzgerald on foot of his judgment, with such interest and costs¶ as aforesaid. And that said plaintiff be also paid the balance of said sum of £600. 14s. 5d., so due to him on foot of his said mortgage, after crediting any sum paid on account of said judgment hereinbefore decreed to be paid him, with interest and costs as aforesaid.

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* That is, the costs of proving his judgment in the office, for Fitzgerald was not a party to the suit.

† This balance ought to have been found and reported more distinctly. There ought to have been a distinct finding for the additional debt of £157, for the securing of which the mortgage was taken on the 25th of April 1835, and interest ought to have been calculated from that date to the time of the report and the confirmation thereof on the £157; but perhaps this calculation can be made even as the report and decree stand at present.

‡ O'Halloran, the prior mortgagee, can get nothing out of the produce of the sale until the plaintiff's judgment is discharged.

|| The costs of the prior mortgagee follow his debt. Would it

not be more proper that the costs should be paid *first*, in case the fund should be insufficient to pay both debt and costs? for it may be that the principal debtor, the mortgagor, *may* have some other property against which the covenant in the mortgage deed may be available in respect of the mortgage debt, though not in respect of the costs. See, however, the act 3 & 4 Vict.c.105 (10th August 1840).

§ It was unnecessary to award him any costs in respect of this judgment, because, in the preceding part of the decree, the general costs were given to him, which, of course, included these costs of proving his judgment.

¶ That is, the costs of proving the judgment in the office.

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And that the remainder (if any) of the money arising from such sale be disposed of as the Court shall hereafter direct, and that all proper parties do join with the Remembrancer in executing the purchase-deed, &c. ; and either party be at liberty to apply to the Court for further directions. And that the defendant John Mitchell is to have his costs in this cause from the plaintiff,* and that the plaintiff do have and receive the same, together with his own costs, out of the money arising from the sale. And the plaintiff may accordingly make up and enrol a decree, with costs as aforesaid, for the performance whereof the process of this Court is to issue, as in such cases usual.

* This may in some cases be a hardship: *Vide Beames*, the new ed., tit. *Assignee of Insolvent*; and see a very late case in Chancery in England, on this subject. The plaintiff there struggled hard against paying the costs to the insolvent's assignee, and this point is not settled clearly, at least it is not put clearly in any of the text books.

ROLLS.

Wednesday, April 29th, 1840.

PRIVILEGE—ARREST OF SUITOR.

MATHEW AHEARNE *v.* THOMAS M'GUINE, and another.

MR. ATHILL, with whom was Mr. W. Smith, for the plaintiff, now moved (on notice served the preceding day), that the plaintiff might be discharged from the custody of the sheriffs of the county of the city of Dublin, who detained him under a writ of *ca. sa.* at the suit of one Robert Murray.

Ahearne's affidavit stated, that this cause having been in the Lord Chancellor's list for hearing on Wednesday the 27th instant, he attended the Court on that day for the purpose of being present at the hearing of the said cause, and remained in attendance until the rising of the Court, but that the cause was not called on.—That after the Court rose, he departed for his residence at Sinnot-place in the county of Dublin, and on his way, stopped at his place of business in Bolton-street, and remained there until about half-past five o'clock, arranging papers and making preparations for the hearing of the cause.—That after he left Bolton-street he was proceeding homewards, until he was arrested in Dorset-street, under a warrant from the sheriffs of the county of the city of Dublin, founded upon a writ of *ca. sa.* issued out of the Court of Exchequer, at the suit of Robert Murray.—That it was highly important deponent should be present at the hearing of this cause, &c.

Counsel submitted that the plaintiff was clearly privileged at the time of the arrest, and should be discharged. *Lightfoot v. Cameron* (a); *Childerston v. Barrett* (b); *Pitt v. Coomes* (c).

Mr. Chambers Walker, for the detaining creditor, submitted that Mr. Ahearne ought not to be discharged. He has been accommodated with more time for the payment of this debt than he had any right to expect, and the writ was not issued for his arrest until it appeared that the plaintiff at law had little chance of obtaining the payment of his demand by any other means. The going to Bolton-street and staying there for upwards of two hours, was such a deviation and delay as waived the alleged privilege. At any rate, this application should have

This cause being set down for hearing, and in the Lord Chancellor's list for the day, the plaintiff attended in Court until the Court rose, but the cause was not called on. Upon leaving Court he called at his place of business, and remained there about an hour and an half sorting his papers and making other preparations for the hearing of the cause, and when proceeding from thence homewards, was arrested under a *ca. sa.* issued out of the Exchequer for a large amount. *Held*:—that he was privileged and should be discharged. *Held* also, that he was entitled to apply to this Court for his discharge.

(a) 2 W. Blackst. 1113.

(b) 11 East, 439.

(c) 5 B. & Ad. 1078.

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been to the Lord Chancellor, before whom the cause was standing to be heard.

MASTER OF THE ROLLS.

I have lately had before me two or three cases very similar to the present,* and upon looking into the authorities I had no doubt, that I, as well as the Lord Chancellor, had jurisdiction to dispose of the applications, and that I should discharge the parties as having been privileged at the time of the arrest. A suitor has a right to assist at every stage of the cause in which he is concerned, and is privileged in so doing. The main question in cases of this kind is, whether at the time of the arrest, the party was in *bona fide* attendance upon the cause, or was in the act of going to or returning from such attendance? I think that Mr. Ahearne was privileged in this case.

ORDER:—Declare the said Mw. Ahearne to have been privileged from arrest at the time he was arrested; and let him be discharged from the custody of the sheriffs of the county of the city of Dublin, under the *ca. sa.* which issued at the suit of the said Robert Murray.

* The two following cases, which by accident have not appeared in their regular order, and are now inserted, are probably those to which his Honor alluded.

Monday, January 20th, and Wednesday, January 22d.

SUITOR'S PRIVILEGE—GOING TO VERIFY CHARGE.

BROWN v. M'DERMOTT.

Under an order of reference, the Master directed that the plaintiff, who was resident in the co. Galway, should file a charge and verify it by his affidavit. The plaintiff's solicitor accordingly wrote to him requiring his presence in Dublin upon the subject; in consequence of which the plaintiff came to Dublin on the 24th of November 1839, and was detained from day to day in giving the required information and assistance for the preparation of the charge, and in waiting for the directions of counsel respecting it, until the 24th of December following, when the charge having been approved by counsel and engrossed, was ready to be filed. The plaintiff being in debt and fearful of being arrested if he should go down to Court to verify the charge, an appointment was made between him and his solicitor that, on the said 24th of December, the solicitor should accompany him to the house of the Master's Examiner, that he might there make the required affidavit; and on that day, the plaintiff when on his way to the office of his solicitor for the purpose of keeping the said appointment, was arrested under a *ca. sa.* issued out of the Exchequer, and shortly afterwards a number of detainers upon him were lodged with the sheriffs.—*Held*, that he was privileged at the time of the arrest and should be discharged.

It appeared that the plaintiff's residence was in the county of Galway, and that an order of reference as to certain matters of account having been obtained on his behalf, his solicitor wrote to him desiring his pre-

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sence in Dublin, and in compliance with the directions of his solicitor, he arrived in Dublin on the 20th Nov. 1839. On the following day there was a meeting before the Master on a summons to proceed under the order of reference; and the Master directed that the plaintiff should file a charge stating particulars, and verify it by his affidavit. From the nature of the case there was some unavoidable delay in the preparation of the charge, and from the 21st of November until the 24th of December following, the plaintiff was detained in town in communication with his solicitor and his counsel from day to day, and in giving the necessary information and assistance for the preparation of the charge. Being in great pecuniary embarrassment, and fearful of arrest for debt, he wished to avoid observation and declined going down to Court; and on the 24th of December, the charge being then engrossed and ready to be filed, he appointed with his solicitor to accompany him on that day to the house of the Master's Examiner, who had agreed there to take the affidavit verifying the charge; and when on his way to and within a few steps of the house of his solicitor, for the purpose of keeping the said appointment, he was arrested under a warrant from the High Sheriffs of the County of the City of Dublin, upon a *ca. sa.* issued out of the Exchequer at the suit of one Robert Murray, one of the Officers of the Provincial Bank of Ireland. The affidavit of the plaintiff's solicitor stated, that the plaintiff's presence in Dublin was indispensable for the purpose of preparing the charge, &c., and the plaintiff stated on oath that he had come to and remained in Dublin upon the business of the said charge exclusively; and that he had been in the utmost anxiety to have it prepared and filed, that he might return home.

Since the arrest, the plaintiff having unavoidably lain in prison during the Christmas recess, a number of detainers upon him had been lodged with the sheriffs.

The application for the plaintiff's discharge was first made on Monday the 20th of January, on notice of the 16th January to the sheriffs, the plaintiff at law at whose suit the caption had been effected, and the several other persons who had lodged detainers. It was then ordered to stand over until Wednesday the 22d for a further affidavit, and was then renewed accordingly.

Mr. Blake, Q. C., for Brown, submitted that he was privileged at the time of the arrest; *List's Case (a)*.

Messrs. Baker and Patrick Blake, *contra*, cited *Strong v. Dickenson (b)*.

(a) 2 Ves. & B. 373-4.

(b) 1 Tyr. & Gr.

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MASTER OF THE ROLLS.

Take the usual order to discharge the said J. Brown from custody at the suit of the several persons mentioned in the notice of this application, and on whom the said notice was served, and also from all subsequent detainers* since the service of the said notice of the 16th January 1840.

* See *Fitzmaurice's Case*, 1 Mol. 512.

Wednesday, January 29th 1840.

SUITOR'S PRIVILEGE FROM ARREST—DEVIATION.

MAHON v. MAHON.

A principal defendant having come to town for the hearing of a cause in the Lord Chancellor's list, and having been on his way from his hotel to his solicitor's office arrested under a *capias ad resp.*

Held:—that he was privileged and should be discharged, although he had deviated and remained a little for his amusement.

Held also, that although the cause for which the defendant came to town was to be heard by the Lord Chancellor, yet as it was generally depending in Chancery, the Master of the Rolls might make the order allowing the defendant privilege and ordering his discharge.

THIS cause being in the Lord Chancellor's list, and being daily expected to be called on, the principal defendant came to town to be present at the hearing. On his way from Morrisson's Hotel in Dawson-street where he had arrived, to the house of his solicitor, for the purpose of making inquiries respecting, and arrangements for the expected hearing, when passing through Westmoreland-street he was induced to deviate a little from his direct way by going to an exhibition of paintings in College-street, where he remained (as stated in his affidavit) not more than five or ten minutes at most. Shortly after leaving the exhibition he was arrested under a warrant of the sheriff of the county of the city of Dublin upon a *capias ad respondendum* at the suit of one White.

Mr. Blake, Q. C., with whom was Mr. Maley, for the defendant, now moved for his discharge, submitting that, upon the above stated facts, it appeared he was privileged at the time of the arrest.

Mr. Richard Moore, Q. C., and Mr. Christian, for the detaining creditor, said that this Court had not jurisdiction to grant the present application: that the motion should have been made either in the Law Court which issued the writ whereby the caption was effected, or to the Lord Chancellor, by whom the hearing was to be, in respect of which the defendant claimed his privilege from arrest.—That the attendance of a suitor upon the hearing of his own cause, in which a solicitor and counsel are retained for him, is for his own satisfaction merely and unnecessary to justice; and therefore ought not to be considered as giving him any immunity from his fair liabilities.—That such a case is totally different from that of a solicitor, whose attendance is necessary to the administration of justice, and who is bound to attend to the business

of his client, or to that of a witness whose non-attendance would be a contempt and subject him to a heavy penalty.—But even supposing that the defendant when leaving his hotel, had the privilege contended for, he lost it by the deviation and loitering in the exhibition room.

[The cases mentioned on either side were *Burke v. Higgins* (a); *Gibbs v. Phillipson* (b); *Ex parte Tillotson* (c); *Lightfoot v. Cameron* (d); *Crone v. O'Dell* (e).]

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MASTER OF THE ROLLS.

Applications of this kind are properly made to the Court where the cause is depending, in respect of which the party claims his privilege.* Here, the privilege alleged is by reason of attendance upon a cause depending in Chancery, and I have no doubt that I have jurisdiction to order this gentleman's discharge, if upon the facts stated it appears that he was entitled to the privilege at the time of the arrest. A suitor is entitled to attend upon every stage of the cause at which his attendance is required, and is privileged in so doing. The particular occasion of the attendance being, in this case, the hearing of the cause by the Lord Chancellor, is accidental and does not affect the nature of the present application, nor limit to his Lordship only the jurisdiction for entertaining it. The case would have been the same in principle, if the required attendance had been in the Master's office; and I have at present only to inquire,—whether Mr. Mahon's attendance upon the hearing of the cause, in which he is a principal defendant, is, or ought to be, a privileged attendance? and if so, whether his deviation into the exhibition room in College-street forfeited the privilege to which he should have been otherwise entitled?

Whether the privilege in these cases be, upon the whole, expedient or otherwise—whether it ought to be extended or restrained—I do not at present say; but, considering the uniform practice of the Courts respecting it, I feel bound to follow their example, and to allow it in the like cases to those in which they have already allowed it. I cannot see the distinction contended for between the attendance of a solicitor or witness, and the attendance of a plaintiff or principal defendant at the hearing of the cause: the grounds upon which their respective privileges rest may not be exactly the same, but it seems to me that the same principle which gives the privilege in the one case must extend it to the

(a) 2 Hog. 110.

(b) 1 Russ. & My. 19.

(c) 1 Stark. 470.

(d) 2 W. Blackst. 1113;

(e) 2 Moll. 11 Ves. 439; 525. In the matter of *Keane*, Sausse & Sc. 81, 83.

* See *List's case*, 22 Ves. & B. 373—4; but see also the late case of *The Attorney General v. the Skinners' Company*, 1 C. P. Coop. 1, where it is laid down that the application may be either to the Court from which the process issued, or to the Court of which the caption is in the nature of a contempt.

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others also. Where a man's rights are immediately concerned, he has an obvious right to be present, nor can his attendance be considered as a needless or voluntary act. Although the suitor's presence may not in general affect the course of the discussion, nor the adjudication of the Court, cases may be easily imagined in which his attendance must not only facilitate and enhance the services of his professional representatives, but also be of the utmost importance for the protection of his rights and the administration of justice in the case. Therefore, I cannot think that the attendance of a plaintiff or a principal defendant at the hearing of the cause, is a mere voluntary and unprivileged act; and taking—as on this motion I am bound to take—Mr. Mahon's sworn statement as true;—that the cause being about to be heard and in the Lord Chancellor's list, he left his home and came to town for the purpose of being present at the hearing; and shortly after his arrival, when walking from his hotel to the house of his solicitor, to consult with him and make arrangements for the hearing, he was arrested at the suit of the present detaining creditor;—I am clearly of opinion that he was privileged at the time of the arrest, and must be discharged.—As to the deviation by the few paces from Westmoreland-street to the exhibition room in College-street, I think it unimportant. The defendant swears that he did not remain there more than five or ten minutes at the most, and it has been decided in a variety of cases* that deviations and delays much more considerable than in this case—for purposes of refreshment too—will not deprive the party of his privilege.

ORDER:—Let the sheriffs of the county of the city of Dublin forthwith discharge the said O'G. Mahon from their custody by virtue of the *capias ad respondendum* which issued at the suit of the said Thomas O'K. White, and also from all subsequent detainers, &c.

* See *Lightfoot v. Cameron*, 2 W. Blackst. 1113; *Pitt v. Coombs*, 5 B. & Ad. 1078; *Richels v. Gurney*, 7 Price, 699; *Sidgler v. Birch*, 9 Ves. 70; *Attorney General v. Skinners' Company*, 1 C. P. Coop. 1.—As to solicitor's privilege, see *Foot's case*, 2 Moll. 530; *Fitzmaurice's case*, 1 Moll. 512; *Longfeld v. Carpenter*,—in *re Fitton*, 1 Ir. Eq. Rep. 330. In the matter of *Keane*, Sausse & Sc. 81, 83.

Wednesday, May 6th.

PROCEEDINGS STAYED—COSTS OF DEFENDANTS.

LOFTIE v. LORD FORBES and others.

HARE v. LORD FORBES, O'KEY, and others.

On the 13th of June 1838, after there had been a decree in the first cause, this Court was pleased to order, upon an application made on behalf of the plaintiff and the inheritor of the lands in the pleadings in that cause mentioned,* that all further proceedings in the second cause should be stayed, and that the plaintiff in the second cause should be at liberty to go in and prove his demand under the decree in the first cause, and be allowed such costs as were properly and necessarily incurred by him† in said second cause, and also the costs of such of the defendants in the said second cause as he should be liable to pay, including his costs of appearing on that motion. Accordingly, the second cause was stayed, and the plaintiff proceeded with all reasonable despatch under the decree in the first cause, but had not up to the present time obtained payment of his demand or of the costs mentioned in the foregoing order.

An application was now made in the second cause, upon behalf of the defendant Charles O'Key, that the plaintiff the Rev. Charles Hare, should pay him the amount of his taxed costs in that cause. O'Key was also a party defendant in the first cause. The present application was resisted on the part of Mr. Hare, upon the ground that the costs in question were in fact provided for by the order of June 1838, and would be paid as soon as an order allocating the funds in the first cause could be obtained; and that under the circumstances, O'Key ought not to be permitted to press for them in the mean time.

MASTER OF THE ROLLS.

The case is one of considerable difficulty on both sides. Mr. Hare naturally complains that as his cause has been stayed, and he has been obliged to go in and prove his demand under the decree in the first cause, it would be a hardship upon him if he should be obliged to pay the costs of parties who were properly made defendants in the restrained cause, before he shall himself have received them as part of his demand under the decree in the first cause; on the other hand, the defendant Mr. O'Key says, with equal fairness, that it would be a hardship upon him, if he should be obliged to wait the termination of the first cause (in which it is probable he could not file any charge for his present demand), to be paid the costs which he has been put to as defendant in

Where there are several creditor suits, and proceedings in the last instituted are stayed, and the plaintiff ordered to go in under the decree in the first cause, and prove his demand including his costs properly and necessarily incurred, and the costs which he should be liable to pay to the several defendants, he is personally liable in the first instance to pay the costs of the defendants who are not obliged to wait until funds are allocated or realised in the first cause. But where the restrained cause, though unnecessary, was not vexatiously instituted, and the plaintiff had been compelled to pay the costs of some of the defendants, the Court ordered the receiver in the first cause to pay to him the amount of the costs which he had been so compelled to pay.

* See *Hill v. Avrell*, and *Lynch v. Skerrett*, 6 Law Rec. N. S. 21, 81.

† See *Batman v. Bateman*, *anti*, 296.

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Mr. Hare's suit. Therefore, as the hardship on both sides seems pretty nearly balanced, it cannot, I think, afford any satisfactory ground of decision in this case.

In *Croker v. Copley* (a) the late Master of the Rolls held, contrary to an opinion formerly entertained by him (b), that where a cause is stayed and the plaintiff is ordered to go in and prove his demand, including the costs of himself and of the other necessary parties in the suit so stayed, under the decree in another cause, a defendant in the stayed cause need not wait till the funds are allocated in the other, but is entitled to have his costs immediately from the plaintiff. Every suitor, who comes here for relief, necessarily makes himself liable to the rules and practice of the Court. One of the rules is, that where two suits are instituted and a decree has been pronounced in one of them, under which the plaintiff in the other can have effectual relief, the Court will stay the proceedings in the second cause, and oblige the plaintiff to prove his demand under the decree in the first.

It is of the utmost importance that the practice of this Court should not hold out inducements to creditors to waste a debtor's estate by a multitude of suits where one would be sufficient; on the contrary, it should if possible present to them sufficient motives for inquiring seriously whether they may not have effectual relief in a cause already instituted, without the necessity of instituting another. I think that Mr. Hare must pay the defendant's costs; and I hope that, for the future, parties will hesitate before they institute additional suits, when they consider that they will be personally liable for the costs of them in the event of their being stayed. Perhaps, as it appears that Mr. Hare's suit was not vexatiously instituted, and as the proceedings in it have been stayed for the benefit of the estate, it would not be unreasonable that he should have, out of the funds in the hands of the receiver in the first cause, the costs which he must now pay to Mr. O'Key; but upon the present motion I do not mean to pronounce any decision upon that subject.

ORDER:—Let the plaintiff, within one week from the date of this order, pay to James Scott Molloy, the solicitor of the defendant Charles O'Key, the sum of £28. 19s. 6d., being the amount of his taxed costs in this cause.—No costs of this motion.

On a subsequent day (May 15th),

Mr. Rolleston, for the Rev. C. Hare, the plaintiff in the second

(a) 2 Mol. 469.

(b) In *Jackson v. Curtis*, 2 Mol. 463.

cause, moved that the receiver in the first cause should pay him the sum of £28. 19s. 6d, being the amount of the taxed costs of the defendant C. O'Key, which the said plaintiff had been ordered to pay, and that the said receiver should also pay the taxed costs of the several other defendants in the said second cause.

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The MASTER OF THE ROLLS said, that under the circumstances, he thought the present application was a reasonable one, and that there was a clear distinction between the costs incurred by the plaintiff himself, and the costs of the several defendants, which he was liable to pay.

ORDER:—Let the receiver in the cause of *Loftie v. Lord Forbes and others* pay to the said Rev. Charles Hare, the plaintiff in the second cause, the sum of £28. 19s. 6d., being the amount of costs paid by the said plaintiff to Charles O'Key, a defendant in the second cause; and let the said receiver also pay the costs of the several other defendants in the said second cause; and let him have credit for the same in passing his account.

Thursday, May 7th.

PRACTICE—CROSS-EXAMINATION OF WITNESSES.

M'NEICE v. AGNEW and others.

MR. T. K. LOWRY moved, on behalf of the defendant James Agnew, that publication of the depositions of witnesses taken in this cause might be respited until the 25th of May instant; and that a new commission might be issued for the examination of witnesses; and that the plaintiff might be ordered to produce at her own expense before the Commission Examiner two persons, named Thomas Walker and James Craig, who had been already examined as witnesses on behalf of the plaintiff, for cross-examination by the defendant.

It appeared from the affidavits that the examination of the plaintiff's witnesses commenced at 11 o'clock in the morning of the 3d of April,

Where on the day of the examination of plaintiff's witnesses in the country pursuant to notice to the defendant, the defendant's solicitor gave notice to the Examiner and the plaintiff's solicitor, that he intended to cross-examine but did not

lodge the cross-interrogatories until the following morning; and it appeared that on the evening after the direct examination, the witnesses (having been told by the Examiner and the plaintiff's solicitor, that as cross-interrogatories had not been lodged before the direct examination closed they were not bound to remain), sailed on their return to England:—the Court ordered that publication should be respited, and a new commission to be issued to the former Commissioner, and that the plaintiff should produce the witnesses for cross-examination at her own expense.

Leave given to examine *prochein amy* of infant plaintiff as witness for defendant.

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at Belfast, before the Commission Examiner, pursuant to notice for that purpose regularly given;—that on the same morning, the defendant's solicitor informed both the Examiner and the plaintiff's solicitor of his intention to cross-examine Walker and Craig (who had been brought over from England as witnesses for the plaintiff), but did not lodge the engrossment of his cross-interrogatories with the Examiner until the following morning at eleven o'clock, when he found that Walker and Craig had been examined on the previous day, and had in the evening returned to England by the steam boat, the plaintiff's solicitor and the Examiner having informed them that as cross-interrogatories were not lodged before their direct examination closed, they were not bound to remain longer. A notice was then served on the plaintiff's solicitor, requiring him to produce Walker and Craig for cross-examination, but he refused to do so; and counsel now relied upon the practice of examining in Dublin, which is the same as the English practice,* and requires a party producing a witness to keep him in town for cross-examination forty-eight hours after his direct examination commences, and he submitted that the same rule should govern the examination of witnesses in the country.

Mr. *Tomb*, *contra*, insisted that the only notice a party producing a witness in the country was bound to give his opponent, was the usual notice of the time and place, when, and where, the examination would be held, and that it was the duty of a party intending to cross-examine a witness to lodge his cross-interrogatories before the direct examination closed, otherwise he lost the right of cross-examining the witness, but might bring him back by *subpoena* as a witness for himself.

The MASTER OF THE ROLLS said he was satisfied that a fair opportunity had not been given for the cross-examination of the witnesses mentioned, and that they appeared to have been sent away with unusual precipitancy, and without allowing the defendant a reasonable time for lodging his cross interrogatories.

ORDER:—That publication be respited as desired, &c.; and that a new commission should issue directed to the former Commissioner, and that the plaintiff should produce her witnesses mentioned in the notice of this motion for cross-examination, at her own expense.

Examination
of *prochein*
amv of minor
plaintiff as a
witness for de-
fendant.

On a subsequent day, Mr. *Lowry* moved that the defendant, James Agnew, might be at liberty to examine Jane Connor, the mother and

* See 2 Dan. Ch. p. 487.

next friend of the plaintiff, as a witness on behalf of the defendant, and cited *Bird v. Owen* (a), in support of the motion.

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The MASTER OF THE ROLLS, having taken time to look into the authorities, made the order as desired.

(a) Mos. 312.

Wednesday, June 2d.

PRACTICE—CONDITIONS OF SALE—SEVERAL LOTS—
SEARCHES FOR JUDGMENTS, &c.

FITZGERALD v. LANE.

MR. FRANCIS GOULD, for the plaintiff, moved that it might be referred to the Master to settle and approve of the following condition of sale as to the lands and mills of Ballynulty, which were about to be sold under the decree in this case :—“That the purchaser of the said lands and mills of Ballynulty shall not require to be furnished with “original searches for judgments against any person against whom such “searches have been already made at the instance of the purchaser of “the lands of Rathjordan, but shall be satisfied with compared and “certified copies of such searches ;” or for such other order, &c.

It appeared from the plaintiff’s affidavit, that on the 19th of April 1837, the final decree was pronounced in this cause, ordering a sale of the lands of Rathjordan in the county Limerick, and of the lands and mills of Ballynulty in the county Tipperary ; and that on the 22d of April 1839, they were accordingly set up for sale, and the lands of Rathjordan were purchased by H. B. Wise, Esq., for the sum of £12,500, but no bidder appearing for the lands of Ballynulty, the sale was adjourned as to them. In making out title to Rathjordan, a vast number of searches for judgments, Crown bonds and recognizances, were directed by counsel for the satisfaction of the purchaser, of which searches the stamp-duty alone amounted to nearly £20, and the attorney’s fees amounted to a considerable sum. It was also stated that the lands of Ballynulty, now about to be sold, were not likely to produce more than £500, and that the fund would be deficient.

Where an estate was set up for sale in two lots and one of them was sold, but no bidder appearing for the other the sale was adjourned as to it, the Court approved of the following condition of sale to the remaining lot :—That the purchaser should not require original searches for judgments against any person against whom such searches had been already made at the instance of the purchaser of the lot already sold, but should be satisfied with compared and certified copies of such searches.

The MASTER OF THE ROLLS said, he did not remember any previous application for such a condition of sale, but that he thought it a very proper one, and such as he would be glad to see followed in practice. He, therefore, granted the order of reference as desired.

Saturday, June 6th.

RECEIVER—FEE-FARM RENT.

STEVELLY v. MURPHY.

Where the deed reserving a fee-farm rent out of certain lands thereby conveyed in fee was of ancient date, and the rent after various *mesne* assignments was vested in the plaintiff as assignee, and was in arrear; and the estate conveyed by the deed, after various *mesne* assignments, was vested in the defendant as assignee:—
Upon a bill by the assignee of the rent praying a receiver &c., and the defendant's answer admitting the plaintiff's title, but insisting that his remedy was at law, the Court granted a receiver over the premises conveyed by the deed, to pay the arrears and future accruing gales of the rent, although the deed contained clauses of distress and re-entry in case of non-payment.

By deed bearing date in the year 1714, one John Haman conveyed certain premises in the city of Cork to Elias Laserre, and his heirs, for ever; reserving to the said John Haman, and his heirs, a perpetual yearly rent of £19. 17s. The deed contained a covenant for payment of the rent, and clauses of distress and re-entry in case of non-payment within sixty days after each gale day.

The bill in this cause, after setting out the above-mentioned deed, charged that "all the estate and interest of the said John Haman in the said fee-farm rent had come to and legally vested in the plaintiff, and that all the estate, &c., of the said Elias Laserre of and in the said premises had come to and vested in the defendant;"* and that the defendant, as assignee of the premises, had paid rent to the plaintiff, as assignee of the rent; and that two years' rent, to the 29th of September then last past, was due. It further charged, that the plot of ground specified in the deed of 1714 had undergone various alterations in the boundaries and descriptions thereof; and that houses had been erected partly upon the said premises and partly upon the adjoining ground, so as to confuse the boundaries.—That there neither was, nor had been for the last two years, any sufficient distress upon the premises; and that there were various outstanding legal terms, with the particulars of which the plaintiff was unacquainted, but which would or might be set up to defeat his rights in a Court of law.

The bill prayed that the said fee-farm rent might be decreed well charged upon the premises; that an account might be taken of the amount due to the plaintiff; that the defendant should pay such amount to the plaintiff, or in default thereof that the premises or a competent part of them might be sold, and the plaintiff paid out of the produce of the sale; that, in the mean time, a receiver should be appointed, and be directed to pay to the plaintiff the arrears of the said rent, and his costs in this cause, and the accruing gales of rent; and, for that purpose, that the receiver, so to be appointed, might be retained.

* This mode of pleading is not in strictness free from objection, as notwithstanding the payment of rent from the defendant to the plaintiff, the former may have denied the title of the latter who claimed as assignee (see *Rogers v. Pitcher*, 6 Taunt. 201), and put him to the necessity of amending his bill and setting out his title at length. But this case shows that the learned pleader adopted the most expedient course; as the defendant's answer fully admitted the plaintiff's title; and it could not have been proper to encumber the pleading with a voluminous detail extending 130 years back, nor to have incurred the difficulty and very great additional expense of proving it, until it clearly appeared that the doing so was unavoidable.

The defendant's answer admitted the plaintiff's title, and that the defendant was in possession of the premises as assignee of lessee's interest, and that the amount claimed was due. It further admitted that there had been some confusion of boundaries as in the bill stated, but denied that there had not been any sufficient distress upon the premises for the last two years: and submitted that it appeared by the plaintiff's own shewing that his proper remedy was at law, and that the plaintiff had not shown he was entitled to the trusts of the legal estates which he stated to be outstanding; and, therefore, that the person capable of giving a legal discharge for the rent did not appear to be before the Court.

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Mr. *W. Brooke*, Q. C., with whom was Mr. *Berkeley*, now moved for a receiver upon the bill and answer.—*Manley v. Hawkins* (a) should govern this case: there is no sound distinction between a rent-charge and a fee-farm rent, at least as respects the right of the grantee to recover in a Court of Equity. Since the act of 4 G. 2, c. 26, s. 5, which gives the remedy by distress for a rent of this description, it is to all intents and purposes a rent-charge. The ancient date of the creation of this rent (A. D. 1714), and the great difficulty which must attend the pleadings in any action for its recovery, should of themselves be sufficient to justify the interference of a Court of Equity as in the case of bills on the *sole*, and make this an *a fortiori* case to that an annuity or rent-charge. The difficulty in the way of a legal proceeding, from the admitted fact that the original boundaries have been altered and defaced, has in many cases been held sufficient reason for coming into a Court of Equity; *Collet v. Jaques* (b).

Mr. *Lane* for the defendants.—This is the first instance in which it has been attempted to obtain a receiver over an interest of this description. The case of *Hanley v. Hawkins* and the other cases of annuity cited by the counsel on the other side have no application to a case like the present, which is one between landlord and tenant, and in which all the usual remedies—covenant to pay, distress, and re-entry—exist. Any of those remedies might have been pursued at law, and nothing is clearer than that this Court will not encourage a party to put another to the expense of an equity suit, where his demand may have been satisfied in a Court of Law, by a much cheaper and more expeditious proceeding.

That the plaintiff has a clear right to proceed at law, either upon the covenant, or by distress, or re-entry, has not been denied; and it has never been held that a mere difficulty of law pleading, which is all that can

(a) 1 Dru. & W. 636.

(b) 1 Ch. & Ca. 126.

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be alleged here, is a sufficient reason for coming into a Court of Equity for relief. The effect of the success of a such a motion as the present would be the appointment of a receiver for ever on account of a very small annual sum, and entirely to oust the tenant of his possession.

MASTER OF THE ROLLS.

This is a motion on bill and answer, for a receiver to discharge the arrears of a fee-farm rent due to the plaintiff, and to pay the future gales as they shall become due. It appears that the rent was originally created by a deed of the year 1714, whereby one John Haman granted certain premises in the city of Cork to one Elias Laserre and his heirs for ever; reserving to the said Haman and his heirs the perpetual rent of £19. 17s. The deed contained a covenant for payment of the reserved rent, and the common clauses of distress and re-entry in the event of non-payment within a limited time after each gale-day. It further appears that this rent—thus remotely created—has been regularly paid until the last two years; and that the plaintiff now derives his title to it as assignee under John Haman, and that the defendant's title from Elias Laserre is in like manner derived by assignment.

It is said that this is a case of a fee-farm rent—a case between landlord and tenant—and, therefore, different from the case of a mere annuity or rent-charge; but it seems to me that the distinction, if it exists at all, is merely nominal: for I do not think that a grant in fee (without retaining any reversion in the grantor), subject to a rent, could properly be said to have established the relation of landlord and tenant between the parties; nor that, so far as the present question is concerned, any real difference exists between such a rent and the ordinary rent-charge. I am, therefore, of opinion that the case of *Manley v. Hawkins* (a), cited by Mr. Brooke, must be considered as settling the present question; and that as well in the case of fee-farm rents as in the case of rent-charges this Court has jurisdiction, concurrent with that of the Law Courts, to give relief such as is here sought.

But the plaintiff in this case is entitled to equitable relief, upon other and distinct grounds: for it appears that this rent has been paid without question for a very great length of time; and that the difficulty in the way of obtaining effectual relief at law would be almost insurmountable. It has been said by Mr. Lane, that where the right to proceed at law is clear, a mere technical difficulty in the mode of proceeding is no sufficient cause to entitle the plaintiff to come into this Court; and, perhaps, that may be true in ordinary cases, where the difficulty is no greater than every practitioner must be prepared to encounter. But where, as in the present case, it appears upon the face of the pleadings,

(a) 1 Dru. & W. 363.

that the difficulty of proceeding at law would be almost insurmountable, I think it cannot be doubted that such difficulty will fully entitle a party to the assistance of a Court of Equity. In an action upon the covenant, for example—if such an action could be maintained at all by the assignee of the rent, or against the assignee of the fee—it would be necessary to prove the rightful creation of the fee-farm rent, and to deduce the title to it for a period of nearly one hundred and thirty years through various successive descents, deeds of conveyance, and family settlements, and I will venture to say that the difficulty of the case would be sufficient to alarm the best law pleader at the bar. There would be the same objection to the proceeding by distress: for it is now, I think, well settled that the general avowry cannot be pleaded where there is no reversion; therefore, in such a case the avowry should deduce the entire title specially, and the difficulty would not be less than in an action upon the covenant. Then as to the action of ejectment, it has been held, at least by some of the Courts, that the ejectment statutes do not apply to such a case as this; and, therefore, the plaintiff should proceed, if at all, at the common law upon condition broken. Such a proceeding is now almost obsolete, and should be prosecuted with such extreme nicety, that the chance of carrying it to a successful termination must be improbable; and though the plaintiff should succeed, his remedy must be incomplete; for he must hold, subject to the indefinite right of redemption on the part of the tenant, who would be entitled to an account of the profits and to be restored to the possession, as soon as it appeared that by perception of the profits the rent had been discharged. Therefore, I cannot yield to the objection that the effect of granting the present motion might be the appointment of a receiver *in perpetuum*, for the defendant may take care to prevent its being so; and as I find that the plaintiff's remedy at law would be doubtful and incomplete—that any proceeding he could take would be subject to difficulties so great as to render the chance of his obtaining any redress improbable—I have no doubt of his title to equitable relief, nor as to the order which I should pronounce.

ORDER:—Refer it to the Master to appoint a receiver over the lands and premises in the pleadings mentioned, unless within one month from the date of this order the amount due on foot of the fee-farm rent is paid to the plaintiff.*

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* The Reporter is indebted to Mr. BERKELEY for the following note upon the case above reported:—

NOTE.—This decision is very important, as it affords a speedy and effectual remedy for recovering the arrears of a fee-farm rent, a species of reservation which is very common in this country, although comparatively unknown in England. The only

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case to be found in the books, in which a Court of Equity claimed a concurrent jurisdiction with Courts of Law in this respect, is the case of *The Duke of Leeds v. the Corporation of New Radnor*, 2 Bro. Cha. Ca. 818, 518, which is very unsatisfactorily reported, and appears not to have been at all decided upon the same broad principles as those laid down by the Master of the Rolls in the present case. These grounds were principally the extreme difficulties attendant upon any proceeding at law; and as the cases upon the subject are few, and appear never to have been collected, it may, perhaps, be useful to the profession, briefly to consider the different remedies which exist at law for the recovery of such a rent, and how they are to be pursued:—

1. REMEDY BY DISTRESS.—Since the statute *Quia Emptores*, and the act 4 G. 2, c. 26, a rent reserved upon a grant in fee must be considered, as to most of its incidents, to be a rent-charge, and not a service, for there is neither tenure nor reversion. *5 Co. Inst.* 504. And if it be a rent-charge, it is submitted that the general avowry cannot be supported, as the statutes giving this method of pleading only apply in cases of landlord and tenant. The case of *Bulpit v. Clarke*, 1 Bos. & Pul. N. Rep. 56, is an express decision upon the subject in England:—The rent avowed for in that case was a fee-farm rent, and it was held that a general avowry could not be supported. The authority of that case has never (it is believed) been questioned in England, but has been recognised by several subsequent cases; and in the note to *Bradbury v. Wright*, Doug. 627, it is said, that in order to justify a distress for a fee-farm rent, in cases where the statute giving a power to distrain does not apply, it is not only necessary to shew that the rent was a fee-farm, but to call it a rent-charge, and to state that the power of distress was annexed to it. It has, however, been doubted in several cases in this country, whether the general avowry may not be supported, although there is no reversion. The subject came very much under discussion in the elaborate judgments given in the Court of Error in the case of *Pluck v. Digges*, 2 Hud. & Bro. 1; and if the decision of the House of Lords in that case is to be admitted in its full extent, it certainly ought to govern the case of an avowry for a fee-farm-rent; but as it is reported that an eminent Judge, who sat upon the discussion of that case has declared that *he would not hold it as binding in any future case, except where Pluck was plaintiff and Digges defendant*, the case may perhaps be held as strictly applicable only to the case of a lease for lives renewable for ever, which that was. A distinction has, indeed, been attempted to be made upon the difference in the wording of the English and Irish statutes of general avowries, the English act giving the remedy in cases of rent, quit rent, &c., and other services, clearly confining it to rents properly called rents-service, whereas the Irish act speaks of rents generally, and it has been attempted to include all rents under this latter wording, Lord Plunket, in his very able judgment in *Pluck v. Digges*, pp. 79, 80, attacks the authority of *Bulpit v. Clarke*, at least as establishing the principle attempted to be deduced from it, and endeavours to draw a distinction between a fee-farm grant and an ordinary rent-charge, it appearing to be his Lordship's opinion that the general avowry would be maintainable in the former case, although it would not in the latter. It is, however, submitted, that the authority of the cases which decide that a fee-farm rent cannot be avowed for generally, is too well established to be now shaken, and that in any avowry pleaded by the grantee of such a rent, an exact deduction of title is necessary, which, in cases of old fee-farm grants, is attended with so much difficulty, that the remedy by distress is seldom resorted to.

2. EJECTMENT.—The remedy by ejectment has been more frequently resorted to than that by distress; but as it has been decided that such a proceeding cannot be supported under the statutes for ejectment on non-payment of rent, it must be brought with all the formalities, and is attended with all the niceties of the old ejectment at common law. See *Lessee Cowan v. Chambers*, Hayes, 546. The difficulties attendant upon a proceeding of this nature are so great, that the utmost vigilance of the most experienced practitioner is frequently ineffectual to prevent the occurrence of some fatal objection. The course to be pursued is laid down in *Bull. Co. Lit.* 201-2, *et seq.*, and has been very much discussed in the late case of *Lessee Orr v. Stevens*, in the Exchequer, which has not been as yet reported. One rule which it is always necessary to observe, is, that no person but the donor (grantee of the rent), or his heirs, can take advantage of the condition broken (*Co. Lit.* 203, b. n. 1). The ejectment must therefore always be supported upon a demise laid in the name of the original grantee of the rent, or his heir-at-law, which in the case of an old fee-farm rent, frequently conveyed or assigned over (as in the principal case,) is attended with great difficulty. The heir-at-law of a person perhaps a hundred years dead has to be first discovered; then his consent to the ejectment must be obtained; his heirship accurately proved at the trial; and if the ejectment shall ultimately succeed, it has been the subject of much discussion how the assignee of the rent (the person really interested) can avail himself of a remedy which the law provides for the heir and which he alone can take advantage of. If the landlord should ultimately recover, he cannot take advantage of the acts of parliament abridging the right of redemption—but must hold subject to redemption at any time; and the tenant would be entitled to have an account and to have the land again when

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the rent was found to be paid. Enough has, we think, been said to shew the ineligibility of proceeding by ejectment where the rent has fallen in arrear—notwithstanding which (*in the choice of evils*) it was the course usually pursued hitherto in this country.

3. COVENANT.—His Honor, in the principal case, expressed a doubt whether the action of covenant could have been supported against the present defendant; and it would appear upon the authorities, and the principles which apply to the facts disclosed upon the pleadings, that such an action could not in the present case have been maintained. When a person conveys his entire estate to another, the purchaser covenanting to pay a rent thereout to the vendor and his heirs, the covenant in this case will not it seems run with the land, but is merely collateral thereto—and therefore, although the grantee of the rent may maintain an action upon the covenant against the grantor, or against his heir so far as he has assets descended, yet if the grantor of the rent assigns his interest in the lands (as in the principal case), such a covenant being collateral to the land, cannot be held to charge the assignee of the grantor or the lessee of the land. This was Lord Holt's opinion, in the case of *Brewster v. Kidgil*, 1 Mod. 373; for, it is said, that even a warranty, although a covenant real, will not bind the land until judgment had in a *warrantia chartæ*, much less that which is only a personal covenant. It is indeed said, in Lord Raymond's report of this case, "*that the other three Judges seemed to be in a surprise, and not in truth to comprehend this objection:*" but Lord Holt's principle has been carried out in several subsequent cases—and is, it is submitted, now established law. And this will be the case although the assignee be expressly named in the covenant; for although a covenant be for the grantor of a rent and his assigns, yet if the thing to be done is merely collateral to the land, and do not touch the thing demised, the assignee will not be charged; *Spencer's case*, Co. Litt. 16, b. The limits of a note will not permit an extended review of the cases upon this subject, suffice it to refer the reader to the cases of *Milner v. Branch*, 5 M. & Sel. 411, and *Cook v. Earl of Arundel*, Hardr. 87, in which latter case the owner of lands subject to a fee-farm rent, sold part of the land to one under whom the plaintiff claimed; and covenanted, that such part should be discharged from the rent, it was held that this was clearly a personal covenant which would not run with the land, but would charge the heir only in respect of assets; see also *Roach v. Wadham*, 6 East, 289. It would appear, therefore, that in a case similar to that in the text, the action of covenant could not be maintained against the defendant at all, he being the assignee of the interest of the grantor of the rent, and it could only be maintained against the heir of the original grantor, and that only so far as assets descended. This, at the distance of 130 years from the creation of the charge, would be manifestly quite futile. Ejectment at the common law might perhaps be supported upon a demise in the name of the heir of the original grantee, if he could be found; but the chances of ultimate success for the present plaintiff would be very remote. And as to the action of distress, as it is believed that no law pleader has as yet had the hardihood to attempt to maintain the general avowry in a case of this description, the title would have to be specially deduced, and the origin of the rent and the right to grant it must be shewn. The intricacies of a pleading of this kind amount almost to a bar to the attempt. All these difficulties are, however, got rid of by the decision of his Honor in the present case, which will point out an easy and effectual remedy to the profession, until the legislature shall interpose to facilitate the legal remedies for the recovery of such a rent, which it is hoped will be speedily done.

Friday, June 26th.

RECEIVER UNDER 5 & 6 W. 4, c. 55, OVER TERM FOR YEARS.

**In the Matter of EGAN Petitioner, and MULHOLLAND Respondent,
and of the Act of 5th & 6th W. 4, c. 55.**

On petition of a judgment creditor under the 31st sect. of 5th and 6th W. 4, c. 55, this Court will appoint a receiver over a term for years.

Semble, in such case, the relative priority of several judgment creditors is to be ascertained by the date of the absolute order for the appointment or extension of the receiver, obtained by them respectively.

THE petitioner being a judgment creditor of the respondent lately obtained a conditional order, on petition under the 31st sect. of the act of 5th and 6th of W. 4, c. 55, for a receiver over certain premises in the respondent's possession, and held by him under a lease for years only.

Mr. *J. D. Fitzgerald*, now came in on behalf of the respondent, to shew cause against making absolute the conditional order, and argued* that a receiver could not be extended over a term for years under the 5th and 6th W. 4, c. 55. *Littlewood v. Brierly (a)*; *White v. White (b)*.

Mr. *J. H. Blake*, Q. C., appeared for the petitioner but was not called on by the Court.

THE MASTER OF THE ROLLS said, that this question was now raised for the decision of the Court of Chancery for the first time;†—that it was one of great importance, and one to which he would give his best consideration;—and that as the conditional order in this case appeared to be an order made by the Lord Chancellor, he should send the case to his Lordship, if upon consideration he should not be clearly of opinion that the cause shewn must be disallowed.

Monday, June 2nd.

MASTER OF THE ROLLS.

The question upon which I am called on to pronounce my judgment in this case, is now for the first time raised for decision in the Court of Chancery. It is, whether on petition under the judgment act, a judgment creditor can have a receiver over a term of years? Considering the importance of the question, and its novelty in this Court, I have felt it to be my duty to examine it closely, as also the grounds of the decision upon it by the late Lord Chief Baron *Joy* in the cases of *Littlewood v.*

(a) 4 Law Rec. N. S. 121; S. C. 1 Jones, 606.

(b) 1 Jones, 610.

* As the arguments of counsel in this case were in substance the same as those already published in the cases cited, it has been deemed unnecessary to repeat them in the present report.

† See *Reynolds v. Falkiner*, 1 Ir. Eq. R. 95.

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Brierly, and *White v. White* (a) in the Court of Exchequer. For the high judicial character of that learned Judge, no one can feel a more sincere respect than I do; and certainly, it would have been most satisfactory to me if I could have found that my deliberate opinion on the present question was supported by the authority of his. But although I have not that satisfaction, I am of course bound to pronounce the best judgment I have been able to form upon the question; and as my decision differs from those in the Exchequer, I shall, in deference to them, state the grounds of my judgment more fully than perhaps under other circumstances I should have deemed necessary.

The question turns upon the construction of the thirty-first section* of the act, whereby it is enacted that "it shall be lawful for any person "entitled to sue out, or who has already sued out a writ of *elegit* upon "any judgment recovered in any of his Majesty's Courts at Dublin, or "to issue or has issued execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery or to "the Court of Exchequer at the Equity side thereof, for an order that "a receiver may be appointed of the rents and profits of the entire and "not of a moiety only, of all lands, tenements, and hereditaments which "he would be entitled to have extended or appraised under a writ of "*elegit*, or extended, seized or taken under a writ of *levari facias* or "other proceeding on such recognizance;"—"and it shall be lawful for "the Court to appoint or extend a receiver accordingly."—No argument can, in my opinion, be drawn from the words "other property"† in the twenty-eighth section; as it is well known that those words were introduced for the purpose of including every sort of property that might be secured by *custodiam* (amongst the rest money in the funds), so as to render the remedy given by this act co-extensive with the remedy which it abolished; and I need scarcely say that the latter was a mode of proceeding whereby the grossest frauds were often perpetrated, and justice was rarely done. As priority of demand was disregarded by it, it often happened that by a fraudulent *custodiam* the debtor's property was effectually secured against all his creditors, or that a *custodiam* on *mesne* process was a complete bar to prior and superior demands; and even where this was not the case, the great expense and delays to which the proceeding was liable were alike injurious to creditor and debtor, and often ruinous to both. The remedy by *elegit*, though by no means so objectionable, and still available, has yet in many cases been found as tedious and expensive as the *custodiam* process: and I may add, it has frequently been defeated altogether by the technical objec-

(a) 1 Jones, 606, 610; See also *Cashen v. Hayes*, 1 Jones and Carey, 103.

* See this section at length, *ante* p. 145 (n).

† See *Littlewood v. Brierly*, 1 Jones, 608-9.

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tions to which it is liable, when the plaintiff brings his ejectment to obtain the possession. To remedy this state of things—to give the judgment creditor a comparatively expeditious, cheap, and easy method of recovering his demand, and to protect the debtor's estate from undue exaction and ruinous cost—was the intention and policy of the judgment act; and as I have not heard it suggested that the means which it proposes for carrying out such intention, have failed in practice, I cannot help thinking that it should be considered as a remedial statute, for the benefit of both creditor and debtor, and ought to receive a liberal construction. It may, no doubt be said, that this statute "affects the whole landed property of the country;" but the ancient scruples respecting the application of real property for the payment of debts have long since been greatly modified, and by a recent statute we see fee-simple estates made available for the payment of simple contract debts.

But it may be conceded in the present argument, that under the thirty-first section a receiver ought not to be appointed over property in respect of which the judgment creditor might not properly issue an *elegit*; and it is argued that the word "tenements" in this section must mean *freehold* tenements; because, as it is said, although chattels are appraised under an *elegit*, the writ is not applicable except where there is land to be extended—as the statute of *Westminster the second** which gives the writ of *elegit* uses the word *terra* only; and it is further said that a term of years could not be considered as *land*, and therefore is not extendible under an *elegit*.

In the *Second Institute* p. 396, Lord Coke in his commentary upon the statute of *Westminster the second* says "and upon these words, "*mediatum terras sue*, the sheriff hath extended a term for years and "the like." This passage appears to me to be a direct authority for the proposition that the word *terra* in the statute of *Westminster the second* includes *terms for years*, and that they are accordingly extendible as land under an *elegit*. In the case of *White v. White* (a), Chief Baron Joy is reported to have said, in reference to the passage in the *Second Institute* just mentioned—"I have looked into all the cases upon the "subject from Lord Coke downwards; and I find that there has been "a kind of *dictum* in the modern text books, that a chattel real may be "either appraised or extended under an *elegit*. But Lord Coke does "not say that chattels real *can be* extended; all he says is, that they "*have been* extended."—I cannot think that this distinction was intended by Lord Coke, nor can I perceive in the authorities ancient or modern any sufficient ground for doubting that a term for years may be extended under an *elegit*. In *Dalton's Sheriffs*,—a book of very high

(a) 1 Jones, 610.

* 13 Edw. 1. c. 18.

authority—it is laid down at p. 137, that, “A term for years may not “be extended under an *elegit* without finding the commencement and “certainty of the term by inquisition: as the execution by *elegit* must “be by inquisition; and if it be found that the debtor was possessed of “certain land for a term of divers years yet to come, that inquisition is “defective, as the certainty should be found. And the reason is, that “after the debt is satisfied, the party is to have his term back again if “any part of it remains, and the certainty of the term should appear “upon the sheriff’s return.” Again, after noticing the distinction in this respect between the extent of a term and the sale of a term under a *fi. fa.*—that in the latter case the certainty of the term need not appear—the reader is desired to note that, “it is at the election of the sheriff “either to extend or to sell a lease or term, so long as it remains “in the hands of the debtor: that the sheriff may, as he chooses, “either sell it utterly, or extend and deliver it to the conuzee at a “certain annual value *as of freehold*.” A few lines further down, the reader is again desired “here to observe the diversity—the sale of “the term, and the extent of the term.” For the authority of these passages, *Dalton* refers to *Palmer’s case* (a), from which they appear to be little more than extracts. Of that case, a different and, in some respects, an apparently contradictory report has been given by *Croke* (b); but I think that the two reports may be reconciled, and that the difference between them is immaterial to the question now before the Court; as a term of years would be equally within the plain meaning and intendment of the thirty-first section of the 5th and 6th W. 4, whether an *elegit* may be issued for the purpose of appraising or extending it; and we have, at present, nothing to do with the question, whether it is necessary to find the certainty of the term or not—the simple question here being, whether a term of years may be appraised or extended under an *elegit*? That it may, appears to be assumed in all the authorities that I have been able to meet with on the subject. In *Sir Gerald Fleetwood’s case* (c), it was held that a judgment does not bind a term, before the award of execution; but it was also laid down as settled law, that it is at the election of the sheriff either to extend or sell a lease so long as it remains in the debtor’s hands. I believe there is no question that such has been the practice. The passage in the *Second Institute* already adverted to, I must confess appears to me to be a direct authority to the same effect: for I cannot believe that in so very critical a reading upon the statute, in which such a variety of distinctions are observed upon, Lord Coke would without objection or comment have stated the fact that “upon these words *medietatem terræ*

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(a) 4 Co. 74-5.

(b) Cro. Eliz. 584.

(c) 8 Co. 174.

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"*sux*, the sheriff hath extended a term for years, and the like"—unless he had been of opinion that it was lawful for the sheriff so to do. In *Comyn's Digest*, tit. *Execution*, c. 14, it is laid down that the sheriff may extend a term of years, though it be a chattel; and for this proposition the authority of this very passage in the *Second Institute* is cited. Again, the main distinction between the sale of a term, or the delivery of it at a value in gross, and the extent of a term at an annual value, already intimated in the passages I have read from *Dalton's Sheriffs*, is thus stated in *Gilbert's Law of Executions*:—assuming as of course that the term may be extended, he says, at page 35, "But if a term be delivered "by *rationabile extentum*, at an annual value, and not at a value in gross, "then the plaintiff is accountable for all the profits he receives out of "the term upon such extent; and if he receives the debt out of such "term before it expires, the defendant shall be restored to the term "itself" (a). So in the note to *Underhill v. Devereux* (b), Sergeant Williams says, that under an *elegit* the sheriff may either *extend* a term of years (that is, deliver a moiety thereof) or sell it at a gross price appraised by the jury.

As to the word *terra* in the Statute of Westminster, we have, as it seems to me, the distinct authority of Lord Coke, in the passage already mentioned, for thinking that it includes terms of years; and we have also what, as it appears to me, must be considered as a legislative declaration that it is to be so construed in that statute: for, the Irish act of 10th Car. 1, c. 7, sess. 3 (corresponding to the 32 Hen. 8, c. 5, Eng.), being in aid of the statute of Westminster the Second, recites that "Whereas before this time, divers and sundry persons have "sued executions, as well upon judgments for them given of their debts "or damages, as upon such statutes merchants, statutes of the staple, "or recognizances, as have been to them before made, recognised and "acknowledged, and thereupon such *lands, tenements and other hereditaments*, as were liable to the same execution, have been by reasonable "extent delivered to them in execution for the satisfaction of this said "debt, and damages, according to the laws of this realm;"—and by sec. 2, it is enacted "that if hereafter any such *lands, tenements or hereditaments*, as be, or shall be had and delivered to any person or persons "in execution," &c. &c. A "tenement" is defined to be *any thing that may be holden*, and I cannot doubt that within such description a term of years is included.

For the reasons I have mentioned, I think that a term of years is a tenement which might be appraised or extended under an *elegit*, and is within the meaning of the thirty-first section of the judgment act; and consequently that the petitioner in this matter has a

(a) See *Price v. Farney*, 3 B. & C. 733.

(b) 2 Saund. 68, c. f.

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right to have a receiver appointed, pursuant to the prayer of his petition. As I think the petitioner so entitled under the thirty-first section, I would certainly hesitate much before I should allow him to be deprived of his right, because of the supposed difficulty in settling priority as between him and other judgment creditors of the respondent, even if such difficulty really existed. But it seems to me that the difficulty is only imaginary. It was, I think, a mistake to concede that, in a case of this kind, priorities are to be ascertained by the date of the judgment—that is, by the date of its rendition (a). In the thirty-second section it is laid down that “it shall be lawful for the Court to extend “the receiver” from one matter to another, “and to order the rents and “profits to be applied according to the priority of each, as ascertained “by the date of the entry of the judgment or enrolment of the recognition;” but this is not mandatory upon the Court in every case. The thirty-seventh section, which is directed more particularly to the question of priorities, obviously contemplates a variety of cases in which priority is to be determined by the judgment of the Court. It should, in my opinion, go according to the date of the creation of the lien. The entry of the judgment creates the charge on real estate; but in the case of a term for years, the judgment is not a lien until the award of execution: therefore, in the latter case, the date of the judgment is, in my opinion, to be considered as the date of the execution—that is, of the delivery of the writ to the sheriff. The appointment of a receiver under this act is an equitable execution to which this Court will give the effect of a legal execution. When a receiver has been appointed over a term of years, such appointment stands in lieu of the extent of the term under an *elegit*; and I can see no difficulty in the supposed case of another creditor proceeding to sell the term under a *fi. fa.* after this Court shall have appointed a receiver over it: I suspect that the sheriff would not hastily commit himself by such a sale, and I am sure that if he did so he would have reason to repent of it.

Order for receiver made absolute.*

(a) See *Littlewood v. Brierly*, 1 Jones, 609.

* Upon turning to the cases of *Littlewood v. Brierly*, and *White v. White*, 1 Jones, 606, 610, the reader will observe that, in the former, the Court consisted of JOY, C. B., and FOSTER, B., and in the latter, JOY, C. B. was “*solus*,” and that the former application was for a receiver over certain freehold premises and over a term for years, and as soon as the inclination of the Court’s opinion was known, “the petitioner abandoned that part of his application which sought for the appointment of a receiver over “the term of years;” and in the latter case, it does not appear that there was any application for a receiver over a term for years; but the irregularity of the petitioner’s affidavit in not stating, according to the Exchequer practice, “whether the lands over “which it was sought to have a receiver appointed, were freehold or for a term of “years”—upon which irregularity there was not any discussion at the bar—gave rise to the learned discourse pronounced by the Chief Baron. The Court of Exchequer have since refused to appoint or extend a receiver under the judgment act, over terms for years—see *Cashen v. Hayes*, Jones & Carey, 103—but the refusal seems to have

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been without discussion, and grounded altogether upon the cases of *Littlewood v. Brierly* and *White v. White*.

Perhaps it is scarcely worth inquiry, at this day, whether it was within the original intention of the statute of *Westminster the Second*, that a term for years should be thereby extendible under an *elegit*. Considering the character of the times, and what a precarious, unprotected, and comparatively valueless thing a term for years then was, the probability seems very strong, that by the word "*catalla*," the framers of the statute meant to include terms for years as other chattels; and that by the word "*terra*," the freehold was exclusively intended. But, on the other hand, it seems to be quite as clear that, when, in the course of time, old feudal prejudices had died away, and the importance of agriculture and the rights of the cultivator were better understood, the term for years rose in estimation; and when, in the reign of *Henry 8*, this species of property was placed on a new and secure footing, and long terms began to be granted, at rents which, in the progress of society, became little more than nominal—leaving the term often twenty times more valuable than the reversion in fee—cases must frequently have arisen, in which it would have been impossible, when administering the statute of Westminster, to treat a term for years (which has one main quality of real estate, *viz.* immobility) as a mere chattel, without violating the clear spirit of the enactment, and the humane and wise policy which it was intended to subserve. That policy, obviously, was, as far as possible, to get rid of a grievance, which continues to the present day to be the subject of many a bitter complaint, and which, in ancient times, must have been excessive; namely, *the sacrifice of property when exposed to peremptory sale by the sheriff*. Such was the "disease" which the statute was intended to remedy.—[See the rules for the interpretation of a statute laid down in *Heydon's case*, 3 Co. 7-8.]—Without infringing upon the creditor's common law right to have execution of his judgment by *levari* or *fi. fa.* this statute proposes a different mode of execution: protecting the debtor against the practical injustice to which the sheriff's sale was liable; and offering to the creditor, as a consideration for adopting it, that he should thereby have liable to his demand, in the first place, all the debtor's chattels at their fair value, and moreover—what was not previously subject to the execution of a judgment—a moiety of his land.—[It is deemed unnecessary to advert particularly to the nature of the delivery by inquisition (whereby the fair value is ascertained by the finding of a jury, and a purchaser at that value is secured in the person of the plaintiff in execution) with which the reader is presumed to be acquainted: see the note to *Underhill v. Devereux*, 2 Saund. 68, a, et seq.]—Such being, as it is conceived, the plain intention of the statute of *Westminster the Second*, let us observe how that intention must have affected the mode of construing it, after the term for years had become, as it was in Lord Coke's time, and still is, a most valuable species of property, and first in the order of chattels.

Take, for example, the case of a judgment debtor whose personal chattels were of little value, but who was possessed as assignee, after various mesne assignments, of an old term having a long residue of years to come (perhaps two or three hundred), and yielding a clear annual profit equal to the full amount or twice the amount of the judgment and costs. Surely, an execution by *fi. fa.* would be a monstrous, if practicable, measure, in such a case. Even for the interests of the plaintiff in execution, it would probably be very inexpedient, and if he happened to be an honest man, it must be sorely against his will. But what was to be done, if by *elegit* such a term could only be appraised and delivered? Supposing that an *elegit* might issue for the mere purpose of appraising and delivering a chattel, yet it is plain that no man would issue an *elegit* for such a purpose; for if he desired possession of the chattel, he might procure it much more cheaply at a sheriff's sale. Besides, where the debt bears so small a proportion to the value of the term, the notion of appraising and delivering the term implies that the plaintiff is ready to pay down a large sum of money—a supposition which, in his circumstances, might be absurd. It cannot be believed that the statute of Westminster ever contemplated such an appraisal and delivery. The policy of the statute and the interests of society required that this species of property, which in its character is half personal half real—limited and perishable as the one, but immovable as the other—should, as circumstances might require, be, for the purposes of justice, treated as either; that it should be deliverable as a chattel at its gross value, where that value did not considerably exceed the amount of the debt, but that it should be *extendible as land* at its annual value, when its gross value so greatly exceeded the amount of the debt as to render it inconvenient or impossible for that, or any other reason, to appraise and deliver it as a chattel—in other words, that the law should be as it is laid down in the passage cited by the Master of the Rolls from *Dalton's Sheriffs*:—"Est al election del vicount, de extender ou de vender un lease ou terme, tam diu que est remaine en les maiens del dettor; *sc.* le vic, a son election, poet vender ceo tout ousterment, ou il poet extend et deliver ceo al conuzee a certaine annual value, *come de franktenement*." It is respectfully submitted, that in this view of the statute of Westminster, the objection

put by the late Lord Chief Baron Joy, in *White v. White*, "that terms of years are *chattels*; and by the statute of *Westminster the Second*, chattels are to be delivered to the "plaintiff *per rationabile pretium*," would not apply; for the term would be extendible "come defranktenement." Again, as the *elegit* could have no effect, and of course would not issue unless the term was in the defendant's possession (either by occupation or receipt of the rents), at the time of the delivery of the writ, inquiry as to the seizin or possession was merely formal; and as the term was to be extended as of freehold, it is obvious that it was quite unnecessary in practice to alter the ancient form of the inquisition, which continued to be indispensable in cases of actual freehold.

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According to the opinion intimated by the Master of the Rolls, on the question of priorities, it follows that priority, in a case of this kind, is to be ascertained by the date of the absolute order for the appointment or extension of the receiver (see *Haker v. Pettigrew*, ante, 144); and as the term will not be bound before the absolute order, the question will probably arise, whether the respondent may not assign it to a *bona fide* purchaser at any time before such order is pronounced?—Whether the doctrine of *lis pendens* could affect such a purchaser?—*Quære*.

3 & 4 Vict. c. 105.

Since the foregoing remarks were in type, the Reporter has learned that the controversy respecting the construction of the 31st section of the Sheriffs' Act is effectually determined by the recent act of parliament, 3 & 4 Vict. c. 105, s. 21. Of this most comprehensive and important statute, which will come into operation on the 1st of November 1840 (perhaps before these pages are before the reader), some notice seems to be necessary in this place, although the very few hours that have passed since the Reporter first saw the act, and the existing state of this work, render it impossible for him to do more than to offer a few hasty remarks upon it as it affects the questions discussed by the Master of the Rolls in the preceding case.

By the 21st section of the 3 & 4 Vict., c. 105, it is enacted, that in proceeding under the Sheriffs' Act, "and this act, the said Court of Chancery and Court of Exchequer, "at the Equity side thereof, shall have power to appoint or extend a receiver in a "summary way, on a petition at the instance of such person" (*i. e.* a person entitled to sue out, or who has already sued out, a writ of *elegit* upon a judgment) "over any "property of such judgment debtor which such creditor would or could make available for the payment of his judgment debt, by filing (after a writ of execution had "been issued and returned at law upon such judgment) a bill in a Court of Equity, or "by any writ of execution at law." As there can be no doubt that upon a bill filed by a judgment creditor, a Court of Equity may either appoint a receiver over, or sell a term for years of which the judgment debtor is possessed, it follows, as of course, that a receiver may in like manner be appointed on petition.

Since the Sheriffs' Act came into operation, the question, whether a term for years be extendible by *elegit* had little importance, except in so far as it controlled the effect of the 31st section of that statute. Such control and derived importance it has lost; and it must have been speedily forgotten, or remembered as a mere matter of curiosity for the ingenious, if it had not acquired a new and intrinsic importance by the 19th section of the late act. By this section, after reciting that "the existing "law is defective in not providing adequate means for enabling judgment creditors to "have satisfaction from the property of their debtors"—it is enacted, "that it shall be "lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in "pursuance thereof, shall be directed at the suit of any person, upon any judgment "which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's superior Courts at Dublin, to make and deliver execution unto the party in that behalf "suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments which may be of copyhold tenure, as the person against "whom execution is so sued, or any person in trust for him, shall have been seized or "possessed of at the time of entering up the said judgment, or at any time afterwards, "or over which such person shall at the time of entering up such judgment, or at any time "afterwards, have any disposing power which he might, without the assent of any other "person, exercise for his own benefit, in like manner as the sheriff or other officer may "now make and deliver execution of one moiety of the lands and tenements of any "person against whom a writ of *elegit* is sued out." This does not appear to alter the previously existing law, except in so far as it includes the whole of the debtor's lands in the extent, whereas formerly only a moiety was extendible; and that it makes copyhold

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lands (as to the existence of which, in this country, there is much doubt) also extendible upon an *elegit*. As to the equitable account to which the tenant by *elegit* is subjected by the subsequent clause of this section, it will be remembered that the miserable distinction between the legal and equitable account would never have had existence, if the statute of Westminster had been faithfully observed, and the sheriff had accordingly delivered the lands *per rationabile extentum*; but this was in fact never done in modern times. The equitable account, therefore, only revives in practice the ancient and honorable principles of the law.

But as respects the question with which we are at present concerned, it is to be observed that this section, with the exceptions just mentioned, appears to do no more than re-enact the statute of *Westminster the Second*, c. 18, and the 7th section of the Statute of Frauds, and to apply to the same cases as they already applied to. It subjects "lands, tenements, rectories, tithes, rents, and hereditaments" to be extended under *elegit*. The statute of Westminster providing the extent by *elegit* uses the word *land* only; but the Statute of Frauds, in aid of the statute of Westminster, and applying the remedy by *elegit* to equitable estates in the same manner as the statute of Westminster applied to legal estates, uses the words *lands, tenements, rectories, tithes, rents, and hereditaments*. It would therefore seem that the question, whether a term for years is extendible under *elegit*—a question now so very important, as the new mode of execution is likely to revive the practice of *elegit* in many cases—is left by the 3 & 4 Vict. c. 105, as it was before; and that the practical importance of the foregoing decision of the Master of the Rolls, though altered as to its objects, is in no degree diminished.

It may no doubt be said, and with much appearance of probability, that the 19th section of the 3 & 4 Vict. c. 105, was intended to stand in the same relation to the 21st section of that act, as the statute of *Westminster the Second*, and the 7th section of the Statute of Frauds stood to the 31st section of the Sheriffs' Act. Be it so: the former controlled the construction of the latter, but the latter could not control the construction of the former.

Monday, June 29th.

**NOTICE OF MOTION TO STAY PROCEEDINGS—
PLAINTIFFS BEING OUT OF JURISDICTION.**

LORD YARBOROUGH and others v. BRAZIER.

MR. KELLER, for the defendant, moved, as of course without notice, that the plaintiffs should be restrained from proceeding further in this cause until they gave security for costs, it appearing by the bill that they were all resident out of the jurisdiction. The bill was filed on the 22d June instant, and the defendant had appeared on the 27th—[MASTER OF THE ROLLS. Should not this be a motion on notice?—Where it appears by the bill, as in the present case, that all the plaintiffs are resident out of the jurisdiction, notice of motion to stay proceedings until security is given for costs, is not necessary; *Bardy v. Headford* (a).

Where it appears by the bill that the plaintiffs are resident out of the jurisdiction—the defendant's motion that proceedings may be stayed until the plaintiffs give security for costs, is a motion of course.

The MASTER OF THE ROLLS accordingly made the order as sought, that the plaintiffs should be restrained from further proceeding in this cause until they gave security for costs; it appearing by the attested copy of the bill that they resided out of the jurisdiction.

(a) 2 Moll. 464.

Wednesday, July 1st.

WRIT OF NE EXEAT REGNO—ISSUING OF.

JOHN HILL v. JOSEPH O'HANLON, administrator of JOHN O'HANLON.

MR. JOY, for the plaintiff now moved, pursuant to the prayer of the bill in this cause (which had been filed immediately previous to the motion), that a writ of *ne exeat* might issue to restrain the defendant from departing out of the jurisdiction; and also that an injunction might issue to restrain the said defendant from further intermeddling with the assets of John O'Hanlon deceased.

The bill was on behalf of plaintiff and the other creditors of John O'Hanlon deceased, against the defendant Joseph O'Hanlon, as administrator of the said John. It prayed an account of the assets, and an account of the sums due to plaintiff and the other creditors, if any, of

On motion (after bill filed praying an account, &c.), by judgment creditor for a writ of *ne exeat regno*, to prevent the defendant, who was administrator of the conuzor and threatened to leave the kingdom, from so doing,—the

Court refused the writ, inasmuch as the debt was a legal debt, and the plaintiff's affidavit was not positive that assets had been received by the defendant.

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the deceased, and that the same might be paid in a due course of administration; also, that a writ of *ne exeat regno* might issue to restrain the defendant from leaving the country, and for an injunction and receiver. The plaintiff's affidavit verifying the bill detailed the particulars of the debt due to him, which was by judgment obtained against John O'Hanlon since deceased, upon which a stated sum was due; and that the said John O'Hanlon having died intestate some short time since, the defendant, who had not any property of his own, and was not in law related to the intestate, had taken out administration to him, and was about to leave the country; but it stated, *only on belief*, that the defendant had received assets of the deceased to an amount more than sufficient to pay his judgment debts, &c.

The case stood for consideration.

Friday, July 3d.

The MASTER OF THE ROLLS, after adverting to the foregoing application, now said—

This was a motion grounded on the plaintiff's affidavit and certificate of bill filed, for a writ of *ne exeat regno* against the defendant. The affidavit states that as of last Easter Term the plaintiff obtained a judgment in the Queen's Bench against John O'Hanlon for the sum of £305. 9s. 4d., and costs since taxed to the sum of £44. 7s. 11d; that afterwards, on the 14th of May last, the plaintiff issued a *fi. fa.* marked for the amount of the judgment debt and costs, under which the sum of £215. 6s. 8d. was levied and paid in part satisfaction of the judgment, upon which the sum of £134. 11s. 1d. still remains due to the plaintiff; that the judgment debtor has since died intestate, and possessed of considerable personal property; that his next of kin having declined so to do, the defendant Joseph O'Hanlon, who is stated to be neither a creditor of, nor legally related to the intestate, and without any property of his own, has obtained administration; and it is stated on belief, that he has, as such administrator, possessed himself of the assets of the testator to a large amount; that the plaintiff has made several applications to the defendant, without effect, for the payment of the balance due on foot of the judgment; that the defendant threatens to leave the country, and that if he is permitted to do so without giving security, the plaintiff's debt will be lost.

The positive statement as to the sum due to the plaintiff, and the defendant's threat or admission of his intention to leave the country, would under the circumstances be quite sufficient to induce me to grant the present application, if other parts of the case did not, in my opinion, raise an objection to so doing. The writ of *ne exeat regno* has been called a high prerogative writ: it was formerly issued in the service of the Crown only; and although it has since grown into use

between subject and subject, the nature of the writ makes it necessary that the rules which govern the application of it should be exactly observed. Mr. Besmes, in his treatise on the writ of *ne exeat regno*, says, that in a case of this kind the plaintiff need only swear on his belief that assets have come to the hands of the defendant. He refers to an *Anonymous* case (a), which scarcely sustains his proposition. The current of authorities seems to me to be the other way, and I think the reason given for requiring the plaintiff to make any statement at all upon the subject, equally requires that the statement, when made, should be explicit and positive. In *Roddam v. Hetherington* (b), it was decided that the affidavit to sustain an application of this nature must be positive: the statement there was upon information and belief, that upwards of £2000 was due from the defendant; and the Master of the Rolls decided that the affidavit as to the sum due from the defendant should be positive, and therefore refused the application. That case seems to be an authority against the present motion: because, although the present affidavit is positive as to the sum due on foot of the judgment, yet it is on *belief* only as to the defendant's receipt of the assets; and as his liability arises in *auter droit*, it cannot be said that this balance is due from him, until it clearly appears that he has received assets of the testator applicable to the payment of it. In *Jones v. Alephsin* (c), the Chancellor said, that when a creditor files a bill for an account and administration of assets, *if there is a clear affidavit of assets received*, the Court will grant the writ, but not otherwise. This decision agrees in principle with that of the Master of the Rolls in *Roddam v. Hetherington*. Again, in the case of *Boehm v. Wood* (d), where the doctrine as to the application of this writ was much discussed, Lord Eldon, advertng to the requisites of the affidavit for the motion, observed, that there are certain circumstances which admit of no dispute: first, "the debt must be equitable;" second, "it must be due;" third, it must be ascertained, so that the Court may know for what sum the writ should be marked. Now, try the present case by any of those tests. Is this debt equitable? No. Is there a positive affidavit as to the debt due by the defendant—or, in other words, is there a clear affidavit of assets received? No. Has the Court any means in this case of ascertaining the sum to be marked upon the writ? No: for it does not certainly appear that the defendant has received assets, nor that there were assets applicable to the payment of this demand to be received. Therefore, although the facts may be such as would warrant

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(a) 2 Ves. sen. 489.

(b) 5 Ves. 91.

(c) 16 Ves. 470.

(d) 1 Turn. & Russ. 343.

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the Court in issuing the writ, upon the case as it at present appears, I must refuse the application.*

As to the injunction to restrain the defendant from further intermeddling with the assets, if the plaintiff desires it, he can have it as of course.

* On this subject see the case of *Stewart of Graham*, 19 Ves. 313, and *Beames on the writ ne exeat regno*, p. 42, n. 38. See also *Jones v. Sampson*, 8 Ves. 593. The rule as laid down by *Beames*, p. 41, is that "this writ shall not issue for a demand upon which the party can be held to bail at law; or, to put the rule in other words, this writ shall be confined to cases of equitable debt merely." At p. 31, he says the Court requires that the plaintiff should swear either positively or *to the best of his knowledge or belief* that assets had come to the defendant's hands; because the demand arises *in autre droit*: otherwise it would be holding one to bail, *who would not be held to bail at law*. He cites, *Anonymous*, 2 Ves. sen. 489; *Taylor v. Leitch*, 1 Dick. 380; *Boehm v. Wood*, 1 Turn. & Russ.; and a case in *Reg. Lib. A*, 1819, fol. 12.

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ACCOUNT.

See CHAMPERTY.

1. On bill filed by client against solicitor, to set aside a bond and judgment for the amount of an account stated and settled between the solicitor and client after the client had come of age, the solicitor having also acted as agent and manager of the estate of the client during his minority, the Court refused to open the account on the allegations that the greater portion of it consisted of charges for costs and other items for which the client was not properly liable, and that the costs were not taxed, and that it did not contain credits to a large amount, to which the client afterwards discovered he was entitled; *Held also*,—that after a decretal order dismissing the bill as to opening the account, stated and settled, and directing an account of subsequent dealings only, the Court will not on further directions go into an item overcharged and suppressed in the account stated and settled, no sufficient grounds for doing so having been shewn at the original hearing. *C. D'Arcy v. Burke* 1

2. Bill for specific performance of a lease for 21 years, and for an account. It appeared that the defendant held the lands for one life; that the agreement was executed by the agent of the defendant, and possession given under it, and money expended in improvements; but the defendant swore that her agent had no authority from her to do so. There was also evidence of her having subsequently recognised the agreement, and promised to execute a lease pursuant thereto. It appeared that a civil bill ejectment was served upon the plaintiff, and another upon two of his undertenants. The former was dismissed, but the latter being undefended, a decree was ob-

tained thereon, under which he was turned out of possession. In about three years afterwards this bill was filed. Pending the proceedings, the *cestui que vie* in the defendant's lease died; *Held*, that the plaintiff was entitled to an account of the rents and profits of these lands which the defendant had received, or which, without wilful default, she might have received from the day of the execution of the civil bill decree, up to the day of the death of the *cestui que vie*. *E. E. Callaghan v. Pepper* 399
In this case the Court would decree a specific performance, if the defendant's interest had not expired.—*Semble. Ibid.*

AFFIDAVIT.

See ATTACHMENT, 2.

BILL, 21.

1. Upon appeal from a decision in the Rolls, *Held*, that a special case must be made to sustain an application to take an affidavit off the file to prosecute for perjury. *C. N— v. N—* 17
2. By the practice of this Court, a supplemental affidavit cannot be used upon a motion to make a conditional order absolute. *E. E. Smithwick v. Bradshaw* 94
3. On an application for an injunction in a possessory suit against a former tenant, who had taken forcible possession after eviction, ought the affidavit expressly negative the existence of any new contract? *R. Biddulph v. Molloy* 229
4. The affidavit of an agent will not be admitted to verify a petition under the Sheriffs' Act, unless a strong case be made for dispensing with the oath of the principal. *C. Lord Sligo v. O'Malley* 169
5. The affidavit upon which it is sought to obtain a receiver under the Sheriffs' Act, must state expressly when the

judgment is revived; it is not sufficient to state that the petitioner is entitled to sue out an *elegit*. E. E. *In re* — 418

AGREEMENT.

See ACCOUNT, 2.

ANNUITY, 2, 3.

BILL, 22.

EXECUTOR, 2.

1. Where there was a written contract for a lease at a certain rent, and the tenant held under it, but afterwards sought and obtained a reduction of rent, and being unwilling to bind himself to the rent reserved in the contract, omitted to execute the lease for several years, while the landlord was willing to grant it; he cannot afterwards, when the landlord serves notice to quit, fall back on the contract, which by his acts he had repudiated, and enforce the execution of the lease. Where a tenant has held lands under an agreement for a lease, and the landlord considers that the tenant has abandoned or forfeited his rights under the contract, the practice in Ireland is to bring an ejectment, and the landlord ought not to commence dealings with the under-tenants in the occupation of the lands until he has recovered at law. C. *Garrett v. Besborough* 180

2. An agreement to procure a sale of lands in the Master's office to a particular person, at a certain price, is a fraud on the Court, on the public, and on the creditor. The Court itself, for the sake of the public, is bound to take notice of such an agreement, although the defendant falsely denies the existence of it, and sets up a fictitious case on his answer. *Ibid* 194-5

3. The authority of an agent to contract for a lease of lands need not be in writing. A proposal in writing for a lease to an agent, who has not power to enter into a contract for such lease, may be acknowledged by *parol* by the principal, so as to be binding on the principal.—*Semle*. E. E. *Callaghan v. Pepper* 399

ANNUITY.

1. If the mortgagee of lands subject to an annuity, file a bill of foreclosure, and make the annuitant a party, the bill will be dismissed without costs as to the an-

nuitant, for he is an unnecessary party. C. *Paynes v. Creagh* 190

2. A. being entitled to a mortgage on certain lands, vested in a trustee for him, agreed that a subsequent annuity creditor should have precedence over his debt, and joined in a demise of the lands to a trustee for the annuitant; but his trustee, who had the legal estate, did not join in the demise. A. remained in possession until the death of the grantor of the annuity; *Held*, that the annuitant was not debarred from recovering more than the six years' arrears, but that he came strictly within the exception in the 42d section of the 3 & 4 W. 4, c. 27. C. *Drought v. Jones* 303

3. S. L., to whom, by settlement (executed in 1800), an annuity of £200, by way of jointure, was secured in the event of surviving her husband, continued, for many years after her husband's death (which took place in 1809), to receive payment of the same from the hands of her step-son, H. A. L., the inheritor of the estate upon which the annuity was charged. In 1830, the annuity being then two years in arrear, S. L. wrote a letter to her step-son, wherein, after expressing her wish to do what she could to serve him, she stated that she would feel happy in the meantime giving up the £200 annuity which he had paid her since her husband's death, and would also make him a present of the £400, the amount of the arrears then due.—In 1834 H. A. L. died. By his will he charged his real estates with the payment of an annuity of £200 to his step-mother. By a codicil, however, after stating that he had been most reluctantly constrained by circumstances to alter the bequest, he substituted a reduced annuity of £100 for the annuity of £200 granted by his will. The bequest of the smaller sum was accompanied by a declaration, that it was upon condition that S. L. should not seek to raise the annuity of £200 secured by the settlement of 1800, which, the testator stated, she had, in a letter written long since, expressed her intention to relinquish in his favor.—S. L. died in 1837, having previously made her will, and thereby appointed the plaintiff her resi-

duary legatee and sole executor.—It appeared that S. L. had never sought for or demanded either the annuity secured by the settlement, or that granted by the will, after the date of her letter in 1830.—The plaintiff having filed a bill to raise the arrears of the annuity secured by the settlement, the Court dismissed it, so far as it claimed relief in respect of the arrears which accrued in the lifetime of H. A. L., but directed an account of what was due from his death to the death of S. L. *E. E. Langley v. Langley* 313

ANSWER.

See BILL, 1, 2, 3.

PLEADING.

1. Except in the case of a bill for discovery, an attachment for want of an answer ought not to be issued, and will be set aside, as the object of the suit may be fully attained by taking the bill *pro confesso*. *R. O'Brien v. Maunders* 39
2. Bill filed in February 1836, for specific performance of an agreement for a lease; answer filed in the course of the same year, insisting that the contract could not be performed, as it exceeded the defendant's leasing powers, and also setting up two settlements of the estate, to which he craved leave to refer when produced, but did not admit they were in his possession. The answer having been unexcepted to, and issue having been joined, the defendant served notice on the plaintiff in 1837, requiring him to admit one of the settlements, which then lay at his solicitor's office for inspection. After several witnesses had been examined, the plaintiff now moved that he should be at liberty to inspect the two deeds relied upon in the defendant's answer, or if necessary, that he might amend his bill for the purpose of procuring sufficient admissions from the defendant that the deeds were in his possession. The motion was refused with costs. The proper mode for raising the question, as to the plaintiff's right to inspect the deeds, should have been by excepting to the answer, for not admitting the possession. *R. O'Connell v. Denny* 246
3. Where apparently for the purpose of

accumulating costs, several similar answers of vexatious length on behalf of a number of formal defendants who appeared to have acted upon an understanding with the plaintiff, and under the directions of the same solicitor—on motion of the principal defendant, that further proceedings should be stayed, &c., it was referred to the Master to ascertain the amount due to the plaintiffs, and to tax their costs of proceeding against the principal defendant only, but not the costs of proceeding against the other defendants; and it was further ordered, that the principal defendant should pay, &c., he so undertaking, within ten days after the report, and that the cause should be stayed in the mean time; and the plaintiff should not be allowed their costs of appearing on this motion. *R. Bateman v. Bateman* 296

ARREST.

1. This cause being set down for hearing, and in the Lord Chancellor's list for the day, the plaintiff attended in Court until the Court rose, but the cause was not called on; upon leaving Court he called at his place of business, and remained there about an hour and a-half sorting his papers and making other preparations for the hearing of the cause, and when proceeding from thence homewards, was arrested under a *ca. sa.* issued out of the Exchequer for a large amount; *Held*, that he was privileged and should be discharged. *Held also*, that he was entitled to apply to this Court for his discharge. *R. Ahearne v. M'Guire* 437
2. Under an order of reference, the Master directed that the plaintiff, who was resident in the county Galway, should file a charge and verify it by his affidavit. The plaintiff's solicitor accordingly wrote to him requiring his presence in Dublin upon the subject; in consequence of which the plaintiff came to Dublin on the 24th of November 1839, and was detained from day to day in giving the required information and assistance for the preparation of the charge, and in waiting for the directions of counsel respecting it, until the 24th of December following, when the charge

having been approved by counsel and engrossed, was ready to be filed. The plaintiff being in debt and fearful of being arrested if he should go down to Court to verify the charge, an appointment was made between him and his solicitor that, on the said 24th of December, the solicitor should accompany him to the house of the Master's Examiner, that he might there make the required affidavit; and on that day the plaintiff when on his way to the office of his solicitor for the purpose of keeping the said appointment, was arrested under a *ca sa*. issued out of the Exchequer, and shortly afterwards a number of detainers upon him were lodged with the sheriffs; *Held*, that he was privileged at the time of the arrest and should be discharged. *R. Brown v. M'Dermott* 438

3. A principal defendant having come to town for the hearing of a cause in the Lord Chancellor's list, and having been on his way from his hotel to his solicitor's office arrested under a *capias ad resp.*; *Held*, that he was privileged and should be discharged, although he had deviated and remained a little for his amusement; *Held also*, that although the cause for which the defendant came to town was to be heard by the Lord Chancellor, yet as it was generally depending in Chancery, the Master of the Rolls might make the order allowing the defendant privilege, and ordering his discharge. *R. Mahon v. Mahon* 440

APPEAL.

Costs paid under a decree or order, which is afterwards reversed on appeal, must be repaid by the solicitor who received them to the person from whom they were received. *R. Malone v. O'Connor* 13

ASSETS.

See EXECUTORS.

ASSIGNEE.

In a foreclosure suit, the provisional assignee having been made a defendant in consequence of the insolvency of one of the mortgagors, was declared entitled to his costs against the plaintiff, the latter to have them over against the fund. *E. F. Sproule v. Oats* 323

ASSIGNMENT.

1. This Court will interfere by injunction to protect the copyright of the assignee of the author (the reporter of legal decisions), though it appears that at the time of the alleged piracy, there was not an assignment in writing, and the assignee had merely an equitable title, and that some of the cases were *ex relatione*; and it will disregard a permission from the author to infringe the copyright, given after he had parted with his equitable title for valuable consideration, and it had appeared upon the title-page of his work that it was printed for the equitable assignee of the copyright. *R. Hodges and Smith v. Welsh.* 266
2. Where a father being entitled to a sum of money on mortgage, covenanted on the marriage of his daughter, that a certain specified part of it should be transferred to the trustees of the marriage settlement within three months after his death, and covenanted to pay interest in the meantime, such covenant was held to amount to an actual assignment. *C. Brownlow v. Earl of Meath* 383

ATTACHMENT.

1. Except in the case of a bill for discovery, an attachment for want of an answer ought not to be issued, and will be set aside, as the object of the suit may be fully attained by taking the bill *pro confesso*. *R. O'Brien v. Manders* 39
2. To ground an attachment for non-performance of a decree for payment of money, it is not sufficient merely to produce and tender to the defendant the plaintiff's receipt for the money, at the time of making the demand. The money must be demanded under power of attorney from the plaintiff, and that fact must appear by the affidavit made in support of the attachment motion. *E. F. Gregory v. Hand* 93
3. To warrant a party in issuing a writ of replevin, he should have been in clear and unequivocal possession of the thing replevied, at the time of the alleged taking. Where he issues the writ under improper circumstances, he will be attached for his contempt—the writ will

be quashed, and the goods ordered to be restored. *C. Comerford v. Blake* 176

BANKRUPT.

In 1834, P., being a trader, passed his bond and warrant, &c., to secure £450 to B., who entered judgment under the warrant, as of the following Trinity Term. In 1839, B. having duly revived and presented a petition under the 5 & 6 W. 4, c. 55, for a receiver, and on the 24th of April obtained a conditional order, which was made absolute on the 15th of May, when it was referred to the Master to approve of a proper person, and on the 12th of June the Master's report approving of R. as receiver was confirmed, and the tenants ordered to pay him. Pending those proceedings, P. being a trader, committed an act of bankruptcy by lying in prison from the 1st to the 22d of May, twenty-one days. On the 27th of May a commission of bankruptcy issued against him, and on the 10th of June he was declared a bankrupt under the commission. On motion of the assignee for the removal of the receiver, and payment of the rents received; *Held*, that a judgment on warrant of attorney by a trader is to be considered a judgment *by confession*, within the meaning of the 6 W. 4, c. 14, s. 126 (bankrupt act). That a judgment creditor having an order for the appointment of a receiver, under the 5 & 6 W. 4, c. 55, s. 37, continues to be, notwithstanding such order, a creditor, having security for his debt, within the meaning of 6 W. 4, c. 14, s. 126, until the rents have been paid over to him in satisfaction of his demand; and, therefore, the appointment of the receiver in this case being on a judgment on warrant of attorney, was overreached by the bankruptcy, and that the receiver should be removed. *Semle*.—The absolute order of the 15th of May was the order for appointment of the receiver, within the 5 & 6 W. 4, c. 55, s. 37. *R. Laker v. Pettigru* 144

BILL.

I. Amended.

1. A tenant in tail coming into *esse* before issued joined, may be made a party

by amendment of the bill. *R. Knox v. Knox* 93

2. A bill may be amended without an order, once after answer, and after notice of motion to dismiss the bill for want of prosecution. But such amendment after notice of motion to dismiss served, is not cause against the motion to dismiss. *R. Dycers v. Goulding* 57
3. Under the 59th General order (November 1834), where the bill is amended after answer, the defendant having notice that his answer is required to the amendments, is not entitled to a notice to press for his answer. *R. Knox v. Knox* 212
4. When by amendment after answer, the plaintiffs made a different case, of which they were aware at the time of filing the original bill, and prayed relief on the new case, omitting the old prayer—upon motion, the Court ordered the plaintiffs to pay the defendant £10 for the costs of so much of his answer to the original bill as would have been unnecessary if the plaintiffs had originally put forward their case, as stated in the amended bill, in addition to the sum of 20s. late currency, payable on making the amendments. *R. Walsh v. Studdert* 213
5. To an amended bill (filed after answer) stating certain matters, some of which appeared prior, and others subsequent to the filing of the original bill, but not re-stating the plaintiff's whole case as he intended it to appear on the record, the defendant demurred specially, upon the grounds that it was in violation of the 51st and 52d General Order, and the demurrer was allowed. *R. Earl of Mountnorris v. Fetherston* 220

II. Supplemental.

6. Where after the original cause had been set down for hearing in the Chancellor's list, one of the defendants became insolvent, and the plaintiff filed a supplemental bill, bringing his assignee before the Court; the time to answer having expired, the supplemental cause was set down in the Rolls list, to be heard on bill *pro confesso* against the assignees, the original cause being as yet unheard; *Held*, that before the hearing of the original cause, there could be no decree in the supplementa

cause, as there would be otherwise two decrees : and therefore the supplemental cause must be set down to be heard with the original cause. R. *Smith v. Chichester* 32

7. It is improper to move for leave to file a supplemental bill, either before or after issue joined, as no order is necessary for that purpose. R. *Knox v. Knox*. 33

8. It is irregular to introduce in a supplemental bill, filed after issue joined and before hearing, charges contained in the original bill ; demurrer on that ground allowed. R. *Richards v. Page* 223

III. Interpleader.

9. It is no objection to a bill of interpleader by tenant, that it appears by his bill that the rent was adversely demanded by two persons, one of whom had a *prima facie* legal right to receive it, as devisee and executrix of the lessor, and the other a mere equitable claim as heir-at-law, where the adverse claimants were litigating, and the tenant threatened with distress. The tenant, though not a party in the principal cause, may, upon notice in the cause, apply for an injunction without putting the estate to the expense of an interpleader suit. R. *Doran v. Everitt*—*Byrne v. Everitt* 28

10. Where A., the heir-at-law and the devisees under the will of his ancestor, claimed the reversion, and the former served notice upon the tenants to pay the accruing rents to him, and the devisees recovered by distress the first and second gales that fell due ; one of the tenants, before the third gale became due, filed a bill of interpleader ; *Held*, that he was entitled to do so, and pay the rent into Court, although the heir-at-law insisted that the lease under which the tenant held was void against him. R. *Richard v. Hyde* 299

IV. Possessory.

11. A possessory bill is not a proper remedy where the plaintiff's legal title to the possession is not clear, and there are matters of account in relation to the plaintiff's claim in dispute between the parties. R. *Ball v. O Grady* 235

12. On application for an injunction in a possessory suit, a conditional order for both injunctions to issue (to the party

and the sheriff) will be granted. R. *Biddulph v. Molloy* 228

13. In such a case, where the application was against a former tenant who had taken forcible possession after eviction, ought the affidavit expressly negative the existence of any new contract? *Ibid*.

14. See as to the practice in possessory suits. *Sherrock v. Chartres* note 230
V. Dismissal of.

15. The defendant after his discharge as an insolvent debtor filed his answer, and entered the usual rule to dismiss the plaintiff's bill with costs ; the Court set aside the rule to dismiss, and retained the bill, notwithstanding the plaintiff's acceptance of the costs of process after answer filed ; but refused an application on the part of the plaintiff for liberty to dismiss his own bill, without costs. E.E. *Kane v. Russell* 95

16. Where a plaintiff resident abroad did not within a reasonable time comply with an order upon him to give security for costs, the Court ordered him to give security before a certain day, and in default, that his bill should stand dismissed, without costs. R. *Hardwicke v. Warren* 156

17. Plaintiff resident abroad ordered to give security pursuant to former order, on or before the first day of next Term, or in default, that his bill should be dismissed, with costs. R. *Knight v. Wilson* 158

18. If the mortgagee of lands, subject to an annuity, file a bill of foreclosure, and makes the annuitant a party, the bill will be dismissed with costs as to the annuitant, for he is an unnecessary party. C. *Paynes v. Creagh* 190

19. A bill to restrain waste, the damage proved being only £7. 16s., is beneath the dignity of the Court, and will be dismissed with costs at the hearing. C. *Lambert v. Lambert* 210

20. Bill dismissed for want of prosecution without costs, the plaintiff being insolvent. R. *Nugent v. Palmer* 220

21. Where the cause is out of Court, the notice of a motion to dismiss the bill for want of prosecution, should be personally served upon the plaintiffs, and the defendant should come prepared

with an affidavit of such personal service; but if the plaintiff appear upon the motion, he thereby waives the objection that he was not personally served with notice of the motion. Upon a motion to dismiss the bill under the 93d Rule, and cross-motion that the bill should be dismissed without costs, the Court would not enter into the merits of the cause, but *Held* that the bill should be dismissed with costs, only the cause was shewn to be within the exceptions specified in the Rule; and though the plaintiff shewed, by affidavit, certain facts which, at the hearing of the cause, might disentitle the defendant to costs, and would have sustained an application that the plaintiff might be at liberty to dismiss his bill upon paying to the defendant the costs of a disclaimer, the Court would not consider that upon this motion, and ordered that the bill should be dismissed with costs. *R. Grier v. Leahy* 227

22. Bill for specific performance of an agreement to grant a lease, and for an injunction to restrain execution of an *habere*. On the coming in of the answer, the injunction was continued on the terms of plaintiff's giving security for the *mesne* rates by recognizance. On the hearing of the cause, the bill was dismissed with costs, whereupon the defendant brought an action for the *mesne* rates against the plaintiffs, and recovered judgment at law. Upon motion of the defendant's executor, the plaintiffs were ordered to pay the amount of the judgment within ten sitting days after service of the order.—Notwithstanding the dismissal of the bill, the Court retains jurisdiction to make such an order, the recognizance being substituted, in case of the plaintiff, for an actual lodgment of the money in Court, in which case the Court, even after the dismissal of the bill, would have jurisdiction to make an order for payment of the money *E. E. Popham v. Baldwin* 356

See *Costello v. Hunt*, *Ibid*, note.

23. Where a bill is filed in consequence of a difficulty arising upon a will, under which the adverse parties claim, the

Court, in dismissing it, will not give costs. *E. E. Graham v. Thynne* 402

BILL PRO CONFESSO.

See ANSWER, 1.

BILL, 6.

BOND.

See DEBTOR AND CREDITOR, 2.

BYE-GONE RENTS.

See FUNDS AND FUNDS IN COURT.

CAUSE, SETTING DOWN AND HEARING.

See BILL, 6.

1. Where objections have been taken in the office against Remembrancer's report, it is irregular to set down the cause to be heard on report and merits, until the report is confirmed, unless the objections to the draft report have been allowed, and the report as signed varied accordingly. *E. E. Warren v. Power* 107
2. Upon petition under the judgment act, a receiver being appointed, the Court on motion will entertain and decide a serious question of estate, viz., whether a respondent under a limitation in marriage articles, had an estate for life or an estate tail. *R. Brennan v. Fitzmaurice* 113
3. Service of the order for hearing. *E. E. Crosthwaite v. Murray* 323
4. Where a party who has had an opportunity of excepting to the Master's report, presents a petition of re-hearing, praying that the decree may be reversed, he cannot object to the decree on the grounds appearing upon the report. *C. Brownlow v. Earl of Meath* 383

CHAMPERTY.

A party entitled to a moiety of the residue of a testator's personal property, assigns that moiety—*Held*, that the assignee was entitled to institute a suit against the executor for an account of what had been lost by his wilful default, and that such suit was not liable to the objection of champerty. *C. Scully v. Delany* 319

CHARITY.

The Court has jurisdiction to authorise the establishment of a charity *cy-pres* on a petition presented under the 52 G. 3, c.

101. E. E. In re *Lady Belvedere's Charity* 354

COMMISSION TO EXAMINE.

See EVIDENCE, 8.

CONDITIONS OF SALE.

See SALES JUDICIAL, 9.

CONSENT.

1. A consent which recites as facts matters of legal inference, without shewing the grounds for it, will not be made a rule of Court when the correctness of the inference is material. A consent signed by all the parties that the receiver should insure the life of the principal defendant who was only tenant for life, and apply the rents in the first place to pay the annual premiums, will be made a rule of Court, but the receiver will be thenceforth only considered as the private agent of the parties. R. *Gumming v. Ryan* 140
2. A consent, the object of which is the allowance of a sum of money paid by a receiver on account of costs, will not be made a rule of Court, unless signed by the parties themselves as well as by their attorneys. E. E. *Coleman v. Mason* 322
3. The Court will not vacate a receiver's recognizance at the same time he is discharged, even upon the consent of all the parties in the cause. E. E. *In re Fitzgerald v. Hill* 398

COPYRIGHT.

1. Reports of legal decisions are to be considered (as to copyright) as any other literary work. R. *Hodges and Smith v. Welsh* 266
2. Whether certain cases in the law reports may be reprinted at length, in a treatise on the particular subject to which they relate, *quære*. *Ibid.*
3. But it is piracy to collect together, and reprint from the reports of legal decisions, all the cases upon a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions and notes. *Ibid.*
4. This Court will interfere, by injunction until answer, to protect the copyright of the assignee of the author (the reporter of legal decisions) though it appears, that

at the time of the alleged piracy, there was not an assignment in writing, and the assignee had a merely equitable title. And the Court would disregard a permission from the author to infringe the copyright, given after he had parted with his equitable title for valuable consideration, and it had appeared on the title-page of his work, that it was printed for the equitable assignee of the copyright. *Ibid.*

COSTS.

I. In Suits by Creditors.

1. In a creditor's suit for the administration of assets, the executor of the deceased is entitled to his costs, although the estate prove insufficient to pay the debts; the rule of costs according to priorities does not apply to such a case. *Harwood v. Bland* 11
2. The decision of Sir E. Sugden in *Salt v. Donegal*, Lloyd & E. G. T. S., 82, amounts to no more than this, that when individuals of a class entitled to a common trust fund, institute proceedings exclusively for their own demands, and in their causes bring in a portion of the rents of the trust estate, they shall be allowed their costs incurred in realising the fund; but the Court being apprised of the other demands, and being applied to on their behalf, will administer the fund according to the rights of all the creditors entitled; *per* Sir M. O'Loughlin. *Murtagh v. Tisdall* 52
3. Where a cause in which there had been a decree to account was abandoned by the plaintiff therein, who, without any restraining order having been served upon him, came in and proved his debt in another cause; *Held*—that a defendant in the abandoned cause (a creditor whose demand was *puisne* to that of the plaintiff), was not entitled to have the costs incurred by him in the abandoned cause, paid out of the plaintiff's portion of the fund brought into Court in the other cause. *Sembla*—the defendant should have applied for the carriage of the decree in the abandoned cause and had his costs added to his demand. E. E. *Downshire v. Tyrrell* 66
4. Where the bill was filed to recover the amount of a judgment debt out of the

real and personal estate of the conusor; *Held*, that the defendant was a minor, and the heiress-at-law of the conusor was not entitled as against the plaintiff to the costs of putting in an answer.

E. E. *Downes v. Hogan* 112

5. In a foreclosure suit, the provisional assignee having been made a defendant, in consequence of the insolvency of one of the mortgagors, was declared entitled to his costs against the plaintiff, the latter to have them over against the fund. E. E. *Sproule v. Oats* 323

6. In a suit to foreclose a mortgage, after the death of the mortgagee, it appeared that the mortgagee had bequeathed the mortgage debt in different portions, to several persons, and amongst those £2000 had been bequeathed to A. and B., and the survivor of them, his executors, &c.; the personal representative of the survivor had been made a defendant, and £2000 was reported due to him:

Held, That he was entitled to be paid his costs according to the priority of his demand, notwithstanding that the general rule of the Court in foreclosure suits was to allow only one set of costs against the inheritance. E. E. *Cane v. Brownrigg and others* 413

7. In the Court of Equity Exchequer, a *puius* mortgagee need not, in a bill for foreclosure and sale, offer to redeem a prior mortgage; the *puius* mortgagee may insist on the sale, and the prior mortgagee cannot resist it, but the prior mortgagee must be paid his debt and costs of suit first: if, however, there be a judgment or other incumbrance prior to the first mortgage, such prior incumbrance must be paid out of the purchase-money, and that in priority even to the prior mortgagee: and this rule holds good, even though such judgment on other prior incumbrance happens to be vested in the *puius* mortgagee who files the bill for a foreclosure and sale. In the Court of Chancery, the *puius* mortgagee must by his bill offer to redeem the mortgage. E. E. *Perrott v. O'Halloran* 428

8. Where there are several creditor suits, and proceedings in the last instituted are stayed, and the plaintiff ordered to go in under the decree in the first cause,

and prove his demand, including his costs properly and necessarily incurred, and the costs which he should be liable to pay to the several defendants, he is personally liable in the first instance to pay the costs of the defendants who are not obliged to wait until funds are allocated or realised in the first cause. But where the restrained cause, though unnecessary, was not vexatiously instituted, and the plaintiff had been compelled to pay the costs of some of the defendants, the Court ordered the receiver in the first cause to pay to him the amount of the costs which he had been so compelled to pay. R. *Loftie v. Forbes* 443

11. On Dismissing Bill.

9. The defendant after his discharge as an insolvent debtor filed his answer, and entered the usual rule to dismiss the plaintiff's bill with costs; the Court set aside the rule to dismiss, and retained the bill, notwithstanding the plaintiff's acceptance of the costs of process after answer filed; but refused an application on the part of the plaintiff, for liberty to dismiss his own bill without costs. E. E. *Kane v. Russell* 95

10. Bill dismissed for want of prosecution without costs, the plaintiff being insolvent. R. *Nugent v. Palmer* 220

11. Upon a motion to dismiss the bill, under the 93d rule, and cross motion that the bill should be dismissed without costs, the Court would not enter into the merits of the cause, but *Held*, that the bill should be dismissed with costs, only the cause was shewn to be within the exceptions specified in the rule; and though the plaintiff shewed, by affidavit, certain facts, which at the hearing of the cause might disentitle the defendant to costs, and would have sustained an application that the plaintiff might be at liberty to dismiss his bill upon paying to the defendant the costs of a disclaimer, the Court would not consider that upon this motion, and ordered that the bill should be dismissed with costs. R. *Grier v. Leahy* 227

12. Where a bill is filed in consequence of a difficulty arising upon the will, under which the adverse parties claim, the Court in dismissing it will not give costs. E. E. *Graham v. Thynne* 402

III. On Prosecuting Process-server.

13. Where the process-server pleaded guilty to an indictment for perjury, as to the service of process; *Held*, upon the special circumstances of the case, that the plaintiff and his attorney should pay to the defendant all the costs incurred by them in setting aside the process, except the costs of the prosecution of the process-server, over which the Court considered it had no control. Is the plaintiff in general liable for the costs of setting aside process against defendants who have succeeded in convicting the process-server of perjury? The affidavit of the process-server is conclusive as to the fact of service until a conviction for perjury takes place.

Semble. E. E. *Egan v. Doherty* 68

14. A defendant shewed as cause against an attachment for disobeying an injunction, that the affidavit of service was false, and having convicted the process-server of perjury, though contrary to the charge of the Judge; *Held*, that the defendant was entitled to all costs occasioned by the false affidavit, except the costs of the prosecution. *R. Cosgrave v. M'Donnell*, before Sir W. M'Mahon, 1835 77 note

VI. In other cases.

15. Costs of assigning a judgment to a trustee of a conusee for family purposes to which assignment the conusor was not a party, are not chargeable against the conusor. *D'Arcy v. Burke* 1
16. Costs paid under a decree or order, which is afterwards reversed on appeal, must be repaid by the solicitor who received them to the person from whom they were received. *R. Malone v. O'Connor* 13
17. When in consequence of the defendant's refusal to execute the conveyance to the purchaser under the decree, it becomes necessary to apply, that the Master may execute in their names; the estate is not to bear the costs of such application, but the defendants, whose improper refusal made it necessary. *R. Clarke v. De Burgh* 19
18. Where the tenant of a minor's estate obtained an order of reference, as to renewal of the lease under which he held, and the order directed *inter alia*

that the minor's costs of the reference should be paid by the tenant; upon the reference the guardian of the minor insisted that he was not entitled to a renewal without payment of renewal fines, and a protracted litigation ensued, whereby the costs of the reference were trebled on both sides; and it appeared that the tenant was entitled to the renewal without fine, and that he had been paying in his own wrong for several years on account of renewal fines, sums amounting to £300. The Court ordered that the guardian should execute the renewal without requiring payment of the costs of the reference. *R. Campbell v. Bryan* 54

19. Where by amendment after answer the plaintiffs made a different case, of which they were aware at the time of filing the original bill, and prayed relief on the new case, omitting the old prayer; upon motion the Court ordered the plaintiffs to pay the defendant £10 for the costs of so much of his answer to the original bill as would have been unnecessary if the plaintiffs had originally put forward their case as stated in the amended bill, in addition to the sum of £1 late currency, payable on making the amendments. *R. Walsh v. Studdert* 213

20. Where the bill prayed an account on foot of two bills of exchange, accepted by A., deceased, and due and unpaid at the time of his death, and of the costs and expenses incurred by the plaintiff as administrator of A. down to the time when the grant of administration was revoked; and that the amount of the bills due to the plaintiff as creditor of A., and of the plaintiff's expenses as administrator, might be paid out of A.'s personal estate. It appeared that A. had no real estate. The expenses, &c., consisted nearly altogether of the plaintiff's costs in a cause instituted by him as administrator in 1838, for discovery of assets, which after issue joined and publication passed, was frustrated by the present defendants, who were also defendants in that cause, and who being A.'s next of kin, and in possession of his assets, for the purpose of avoiding a decree, lodged in the Prerogative Court

- the will of A. which they had previously suppressed, and procured a revocation of the grant of administration to the plaintiff and a new grant to themselves *cum testamento annexo*. They now pleaded the statute of limitations as to the bills of exchange, and demurred generally to so much of the bill as sought an account, &c., of the plaintiff's costs and expenses as administrator; *Held, first*, that the plea should be allowed, as the plaintiff did not appear to have been under disability, and had not proceeded for his demand within six years after the right of action accrued; *Held, secondly*, that the demurrer should be overruled; as the costs claimed by the plaintiff were incurred by him not merely in his private right as a party in another cause, but in his official character of administrator; and as the grant of administration to him, though voidable, was not void, and conferred on him during its continuance the rights of a lawful administrator, entitled to be paid out of the personal estate of the deceased the expenses properly incurred in the duties of the office; *Held, thirdly*, that as the demurrer was overruled, the plaintiff was entitled to the costs of the hearing. *R. Howlett v. Lambert* 254
21. Where apparently for the purpose of accumulating costs, several similar answers of vexatious length on behalf of a number of formal defendants who appeared to have acted upon an understanding with the plaintiff, and under the directions of the same solicitor. On motion of the principal defendant, that further proceedings should be stayed, &c. it was referred to the Master to ascertain the amount due to the plaintiffs, and to tax their costs of proceeding against the principal defendant only, but not the costs of proceeding against the other defendants; and it was further ordered, that the principal defendant should, &c., he so undertaking, within ten days after the report, and that the cause should be stayed in the mean time; and the plaintiff should not be allowed the costs of appearing on this motion. *R. Bateman v. Bateman* 296
- V. *Security for.*
22. Motion to stay proceedings until plain-

- tiff resident abroad give security for costs, refused, the defendant being aware of his non-residence, but delaying his application until a negotiation for an amicable settlement, opened by him, had terminated unsuccessfully; and several months had elapsed after the notice to press for his answer, and the further time given to him by plaintiff to file his answer had nearly expired, the defendant had therefore waived his objection, as if he meant to rely on it; he should have come immediately, or at least when he was served with the notice to press. A plaintiff resident abroad, but having an estate and residence at C. in the county of T ———, being described as of "C. in the county of T." without further addition, is not a misdescription. *R. Watson v. Pim* 26
23. Where a plaintiff resident abroad did not within a reasonable time comply with an order upon him, to give security for costs, the Court ordered him to give security before a certain day, and in default, that his bill should stand dismissed without costs. *R. Hardwicke v. Warren* 156
24. Plaintiff resident abroad ordered to give security pursuant to former order, on or before the first day of next Term, or in default, that his bill should be dismissed with costs. *R. Knight v. Wilson* 158
25. Where it appears by the bill that the plaintiffs are resident out of the jurisdiction, the defendant's motion, that proceedings may be stayed until the plaintiffs give security for costs, is a motion of course. *R. Yarborough v. Brazier* 463
- VI. *Solicitor's Lien for.*
26. R. S. devised his real estate, subject to his debts and legacies, to his only son, J. S., in tail, and died in 1773. In 1802 J. S. deposited the title deeds with his solicitor, and prior to the year 1813 incurred costs to a large amount, in suffering a recovery, and in the causes of A., B., and C. (the testator's younger children), instituted to raise charges to which they were entitled under the will, &c. In 1813 M., a specialty creditor of the testator on whose debt J. S. paid interest until 1811, filed his bill against

J. S. and A. B. and C., &c., praying for the execution of the trust for payment of debts, and that his demand might be deemed charged on the testator's real estate. J. S. suffered the bill to be taken *pro confesso* against him, and died insolvent before the final decree. Some time before, the solicitor of J. S. became concerned in this cause for the representatives of B., and now refused to bring in the deeds for a sale under the decree, until J. S.'s costs incurred between the years 1802 and 1813 should be first paid. A., B., and C. were reported in priority to M., for whose demand the residue of the fund would be insufficient; therefore, the question as to the solicitor's lien was between the solicitor and M.; *Held*, that the costs now demanded, if rendered necessary by the will, should have been claimed upon the hearing of the cause, and provided for by the decree; and that, therefore, the claim could not now be entertained; *Held also*, that as it did not appear that any of the costs had been incurred before the title deeds came into the solicitor's possession, and as he had full notice of the will when the costs were incurred, he was bound by the trust, and had not any lien upon the deeds as against M., the specialty creditor of the testator, who had proceeded *bona fide* and with due diligence. *R. Morgan v. Scott* 128

7. A solicitor having a lien for costs on title deeds, took from the client a bond conditioned for the amount of the costs, with interest at £5 *per cent.*, and regularly received the interest for several years afterwards, but still retained the deeds. In a general creditors' suit subsequently instituted, it appeared that the entire estate of the client would be insufficient for creditors, whose securities were prior to the bond, but should have been postponed to the lien. The solicitor stated on oath that he accepted the bond only as a collateral security, and never intended to give up his lien; *Held*, that having taken a security for the amount of the costs, *with interest*, the lien was gone. Whether the mere taking a security for the amount of costs, without more, extinguishes the

lien—*Quere. R. Brownlow v. Keatings* 243

28. A solicitor who withdraws from the conduct of a suit, because his client will not furnish him with the funds necessary for carrying it on, has not such a lien for costs already incurred, as will entitle him to withhold from his client and his new solicitor, such of the client's papers as are necessary for the effectual prosecution of the cause; but the Court will order them to be handed over to the new solicitor, subject to such lien as the former solicitor may have for costs. *R. Rutledge v. Rutledge* 290

COVENANT.

1. Where an estate *pour autre vie* is granted in mortgage, and mortgagor and mortgagee jointly make a lease of a portion of the mortgaged premises, reserving rent to both the lessors, and to their heirs and assigns; and the lessee covenants for the payment of the rent accordingly; on the death of the mortgagee the mortgagor may maintain an action of covenant for non-payment of the rent, which accrues due in his own lifetime, the covenant being *quoad* the mortgagor a covenant *in gross*; but *semble*, that the rent which accrues due subsequently to his death goes to the heir-at-law of the mortgagee, who may sue upon the covenant notwithstanding the mortgagor having survived the mortgagee; for the Court will mould such a covenant so as to make the rent go, on the death of the survivor of the lessors, to the party entitled to the reversion. *R. E. Thwaites v. M'Donough* 97
2. Where a father being entitled to a sum of money on mortgage, covenanted on the marriage of his daughter, that a certain specified part of it should be transferred to the trustees of the marriage settlement within three months after his death, and covenanted to pay interest in the mean time, such covenant was held to amount to an actual assignment. *C. Brownlow v. Earl of Menth* 383

DEBTOR AND CREDITOR.

See Costs, 1.

JUDGMENT, 7.

1. It is now finally settled, that in a will of personalty, a trust for payment of debts cannot save them from the operation of the statute of limitations. - *Per Sir M. O'LOGHLEN. Howlett v. Lambert* 261
2. A creditor having the security by bond of a third person for the due accounting of an agent, settled accounts with that agent, and takes from him a bond for the balance found to be due, and bills at different dates for the amount of the bond and the interest thereon, until the last of the bills should fall due; and at the same time stipulates that he is at liberty at any moment to proceed on the original security; *Held*, that this was not a discharge of the surety. *C. Lindsay v. Downes* 307
3. The usual way of putting the question as to the discharge of a surety, namely, whether time has been given, is a foolish way of putting it, and the Courts are obliged to admit that, when they rest their decisions upon the point, that there has or has not been a binding contract to give time. The real question is, whether, by the dealings between the creditor and principal debtor, the former has changed the situation of the surety to such an extent as to injure his chance of recovering the amount of the debt from the principal, by proceeding in the name of the creditor, in case he were to pay that amount himself to the creditor? *Per Lord PLUNKET. Ibid.* 312
4. A creditor coming in under a decree cannot rely upon a will as creating a trust in his favor, unless it have been put sufficiently in issue for that purpose, either by the pleadings in the cause, or by the charge or discharge in the office. *E. E. O'Kelly v. Bodkin* 361
5. If the frame and prayer of a bill be essentially that of a creditor's bill, the omission of the usual introductory statement, that it was filed on behalf of the plaintiff and the other creditors who should come in and contribute, &c., is immaterial, such averment being matter of form merely. *Ibid.*

DECISIONS DOUBTED.

1. The correctness of the report of the *Anonymous* case, 2 Moll. 312, ques-

- tioned in *Knox v. Knox. Per Sir M. O'LOGHLEN.* 34
2. The principle of the decision in *Thomas v. Brigstocke*, 4 Russ. 64; *Gressley v. Adderley*, 1 Swanst. 578; and *Breches v. Gresham*, 1 Jac. & W. 176, should not be extended. *Murtagh v. Tisdall. Per Sir M. O'LOGHLEN* 52
 3. The principle decided in *Mulholland v. Hendrick*, 1 Moll. 359, questioned by Lord PLUNKET in *Garrett v. Besborough* 183
 4. In reference to the case of *Weld v. Bonham*, 2 Sim. & Stu. 91, Sir M. O'LOGHLEN, M. R., said, "I must own "I should have great difficulty in as- "senting to the proposition, that on de- "murrer the Court may look outside the "pleadings for the grounds of its judg- "ment; or that the judgment of the "Court could properly be founded upon "a fact not appearing upon the record. *R. O'Connell v. Cummins* 251, 253
 5. The proposition in *Walsh v. Walsh*, 1 Jones & C. 232, Lord PLUNKET said he would require to have fully considered before he adopted it in its full extent. *Drought v. Jones* 306

DECREE.

See Costs, 3.

The decree to account ought to state the period from which the account is to be taken. *Semble. E. E. Cummins v. Adams.* 394

DEEDS.

See Costs, 17, 11.

INSPECTION, PRODUCTION AND EXECUTOR OF DEEDS.

1. Parties claiming under a voluntary settlement may file a bill in Equity to obtain a declaration of their rights against the settlor. *C. Gannon v. White* 207
2. Where a party claiming under a voluntary agreement seeks to clothe himself with the legal title, the Court will not compel the party who has no consideration to convey the legal estate. *Per Lord PLUNKET. Ibid.* 209
3. When in marriage articles I find an estate for life expressly given, with powers inconsistent with an estate tail, I think I have irresistible evidence of intention that the estate to be taken was for life only. *Per Sir M. O'LOGHLEN. Brennan v. Fitzmaurice* 122

4. When in marriage articles it is stated, that lands are to be limited to a party and his assigns "for his natural life, "and after his decease to heirs of "his body," the Court will consider the latter words of purchase, and not of limitation, and effectuate the intention of the parties by a strict settlement. *Ibid.*

DEFENDANT.

See ARREST, 3.

DEPOSITIONS.

See EVIDENCE, 7.

EJECTMENT.

See LANDLORD AND TENANT.

Election.

- A. upon the marriage of his daughter B. in 1794 granted to trustees an annuity of £100 out of part of the lands of C. in trust for her husband for life, and after his death for B. for her life in case she should survive her husband, and after death of the survivor for the children of the marriage, in such shares as the parents, &c. In January 1813 A. made his will, and after minutely specifying the property of which he was possessed, the head rents and profit rents of each, he devised all these to trustees "to, for, "and upon the several trusts and purposes hereinafter mentioned and none "other;" and "after payment of the "head rents payable thereout" to apply same to the trusts thereafter mentioned; he then directed them to pay £100 a-year to his wife, and subject thereto, he gave to B. an annuity of £50 a-year for her life, and upon the decease of his wife a further annuity to her of £50 a-year, "said two annuities "to B. for her sole and separate use, free "from the control of her said husband;" and subject to the "head rents" and "to "these two annuities to his wife and "daughter," he disposed of the rest of his property, without making any allusion to the charge upon it under the deed of 1794. He died leaving B. and her husband surviving; the latter having died, and a party who became entitled to some of the lands charged with these two annuities having refused to continue to pay both, she filed a bill to raise

the arrears: *Held*, that she was bound to elect. *E. E. Graham v. Thynne* 402

ENTRIES.

Entries made in the chapel books by Roman Catholic clergymen, whose death and handwriting have been proved are evidence of a marriage or baptism recorded thereby. *C. Malone v. L'Estrange* 16

ELEGIT.

See AFFIDAVIT, 3.
JUDGMENT, 4.

ESTATE.

See WILL.

1. By post nuptial articles of 1760, reciting the marriage of J. and C. his then wife, and that they had then issue of their marriage, two sons, H. (the respondent) and T., and one daughter, M. J., covenanted in pursuance of articles before marriage, and for other valuable considerations, to settle his estate to the use of himself for life without impeachment of waste; remainder to trustees to preserve, &c., and after decease of J. (subject to a jointure) to the use of H. and his assigns for his natural life; and after his decease "to the heirs male of "his body," in default of such issue, "to T. and his assigns for his natural "life, and after his decease to his issue "male;" remainder to the third, fourth, and other sons of J. and C. to be begotten, if any, successively, &c., and the heirs male of their respective bodies; remainders over. Power to J., H., T., or any of the issue male of J. and C., to be begotten, who should become seized under the limitations, to make leases for three lives or *thirty-one years*. Power to H., &c., when seized to jointure not exceeding £150 per annum; *Held*, that H. took an estate for life only. *R. Brennan v. Fitzmaurice* 113
2. When in marriage articles I find an estate for life expressly given, with powers inconsistent with an estate tail, I think I have irresistible evidence of intention that the estates to be taken was for life only. *Per Sir M. O'LOGHLEN, M. R. Ibid.*
3. When in marriage articles it is stated, that lands are to be limited to a party and his assigns "for his natural life, and

"after his decease to the heirs of his "body," the Court will consider the latter words of purchase, and not of limitation, and effectuate the intention of the parties by a strict settlement. *Ibid.*

4. Where a testator devised to trustees his "estate and interest" in farms of which he was seized for lives renewable for ever, in trust, after paying certain annuities, &c., to permit and suffer his nephew A. to enjoy the same for his life; and from and after his decease, to permit such son of his as should attain twenty-one to enjoy said lands, and on failure of such remainder to his nephew B., for his life, remainder to his first son as before; *Held*, that a son of A.'s who attained the age of twenty-one, and died in the lifetime of his father, took the absolute interest in these premises. *E. E. Kirby v. O'Hea* 424

EVIDENCE.

I. Generally.

1. A wife is an admissible witness against the personal representative of her deceased husband, to charge his assets. *Semble. Harwood v. Bland* 11
2. Entries made in the chapel books by Roman Catholic clergymen, whose death and handwriting have been proved, are evidence of a marriage or baptism recorded thereby. *C. Malone v. L'Estrange* 16
3. Where to a bill by a tenant for a specific performance of an agreement to grant a lease—the abandonment of the contract, and refusal to execute the lease have been put in issue in general terms by the answer as a defence—can conversations and admissions of the plaintiff not referred to as stated in the pleadings, be admitted as evidence of such abandonment and refusal? *C. Garrett v. Besborough* 180
4. I own that I am not able to come at the principle on which the case of an admission of fraud is distinguished from any other, as in *Mulholland v. Hendrick*. 1 Moll. 359; so as to make it more necessary in pleading to put one sort of admission in issue than another. *Per Lord PLUNKET. Ibid* 183
5. It would answer the ends of justice

better, that in each case (the rejection or admission of evidence in equity imperfectly put in issue) should stand on its own grounds, subject to the exercise of the discretion of the Court to direct further inquiries. *Per Lord PLUNKET. Ibid.* 184

6. Where in a bill for foreclosure and sale, the plaintiffs set forth so much of the mortgage deed as shewed it to be in the nature of a Welsh mortgage, and upon the hearing, plaintiff's counsel produced and sought to read in aid of the bill the deed of mortgage, which contained an express trust for a sale, but the Court would not allow them to do so. *R. O'Connell v. Cummins* 251

II. Practice as to.

7. Depositions wrongly entitled cannot be read, but the party who seeks to use them will be allowed to have them re-sworn upon terms. *E. E. O'Hara v. Creagh* 419
8. Where on the day of the examination of plaintiff's witnesses in the country pursuant to notice to the defendant, the defendant's solicitor gave notice to the Examiner and the plaintiff's solicitor, that he intended to cross-examine, but did not lodge the cross-interrogatories until the following morning; and it appeared that on the evening after the direct examination, the witnesses (having been told by the Examiner and the plaintiff's solicitor, that as cross-interrogatories had not been lodged before the direct examination closed they were not bound to remain), sailed on their return to England; the Court ordered that publication should be respited, and a new commission to be issued to the former Commissioner, and that the plaintiff should produce the witnesses for cross-examination at her own expense.—Leave given to examine *prochein amy* of infant plaintiff as witness for defendant. *R. McNeice v. Agnew* 445

EXCEPTIONS TO ANSWER.

See ANSWER, 2.

EXECUTION OF DEEDS.

See INSPECTION, PRODUCTION, AND EXECUTION OF DEEDS.

EXECUTORS.

1. In a creditor's suit for the administration of assets, the executor of the deceased is entitled to his costs, although the estate prove insufficient to pay the debts; the rule of costs according to priorities does not apply to such a case. *Harwood v. Bland* 11
2. On a decree for a specific performance to purchase lands, the general rule is, that the purchase-money carries interest from the day when the contract ought to have been performed. But in a suit against an executor for a specific performance of a contract by his testator to purchase lands, the plaintiff having taken a decree on consent for specific performance, and a reference to take an account of real and personal assets, was held entitled to interest only from the date of the report, the executor having admitted assets by his answer, and the accounts having been unnecessarily taken. *C. Baraght v. Fitzgerald* 87
3. A Court of Equity will entertain a bill for the preservation of assets, pending a suit in the Ecclesiastical Court to recal probate; and the power of the Ecclesiastical Court to appoint an administrator *pendente lite*, is no objection to such a bill. *E. E. Thomas v. Thomas* 109
4. An executor who joins in taking out probate, but does not act, is liable for the acts of his co-executor, and chargeable for monies lost by the wilful default of such co-executor; where a person is clothed with the character of trustee, the *cestui que trusts* shall not be affected by his acts, except so far as they knew and acquiesced. *C. Scully v. Delany* 165
5. Where the bill prayed an account of the plaintiff's costs and expenses, and for payment thereof, as administrator, down to the time when the grant of administration was revoked, and it appeared that he had instituted a suit for the discovery of assets, which was frustrated by the defendants proving a will which they had previously suppressed, and obtaining a new grant of administration to themselves *cum testis annexo*; a general demurrer to the relief sought was overruled, as the costs claimed by the plaintiff were incurred by him not merely in

his private right as a party in another cause, but in his official character of administrator; and as the grant of administration to him, though voidable, was not void, and conferred on him during its continuance the rights of a lawful administrator, he was entitled to be paid out of the personal estate of the deceased the expenses properly incurred in the duties of the office; *Held also*, that as the demurrer was overruled, the plaintiff was entitled to the costs of the hearing, although the defendant succeeded on a plea of the statute of limitations to part of the relief sought by the bill. *R. Howlett v. Lambert* 254

Although an executor who has once acted by meddling with the assets, cannot, by subsequent renunciation, or the grant of administration to another, be divested of the liability of an executor; yet, if when required to prove the will and administer, he refuses to do so, the Ecclesiastical Court may commit the administration to another, who will, so long as the grant continues, be to all intents and purposes a lawful administrator, whose lawful acts shall remain valid and effectual, though the grant of administration be afterwards revoked. *Per Sir M. O'LOUGHLIN. M. R. Ibid* 261

7. A party entitled to a moiety of the residue of a testator's personal property, assigns that moiety; *Held*, that the assignee was entitled to institute a suit against the executor for an account of what had been lost by his wilful default, and that such suit was not liable to the objection of champerty. *C. Scully v. Delany* 379
8. On motion (after bill filed praying an account, &c.) by judgment creditor for a writ of *ne exeat regno*, to prevent the defendant, who was administrator of the co-nuzor, and who threatened to leave the kingdom, from so doing, the Court refused the writ, inasmuch as the debt was a legal debt, and the plaintiff's affidavit was not positive that assets had been received by the defendant. *R. Hill v. O'Hanlon* 463

FUNDS AND FUNDS IN COURT.

1. When stock was invested in the name of P. M., an infant, and the bank de-

clined to pay the dividends for want of a sufficient receipt, upon petition of infant's father, stating that the stock was his own money, and had been invested by his wife, since deceased, under misapprehension, that he was in great distress, and needed the dividends for the minor's support; although the minor was not a ward of Court, and no guardian was appointed to him, and no cause was depending in which the order could be made, yet the Court, under the circumstances, ordered the Governor of the Bank to pay the dividends to the father, as the natural guardian of the minor, for his maintenance. R. *In re Murphy* 24

2. In 1829, C., a mortgagee, by deed of 1826, duly registered, and W., an annuitant by deed of 1827, duly registered, filed separate bills for the arrears due to them, and a receiver having been appointed and extended to both causes, it was ordered, upon consent, that the receiver's balances, after passing his accounts, should from time to time be paid to C. and W. on account of their demands. In 1831, T., an annuitant, by deed of 1808, defectively registered, filed his bill for the arrears of his annuity, and made C. and W. parties. In 1835, N. P. creditors, by judgment of Hilary 1822 (intervening between the deeds defectively and duly registered), filed an *elegit* bill, making C. and W. parties. T. was not a party to the other causes, nor were N. P. to his cause. In June 1836, the receiver of C. and W. was extended to the cause of N. P., and the future rents ordered to be brought in and lodged to the credit of their causes, whereby the fund in Court was realised before the 1st of May, 1838. In June 1838, upon consent in the causes of C., W., and N. P., it was referred to the Master to report the sums due to them respectively, and their priority. In November 1838, T. obtained a decree to account, admitting the priority of C. and W.: and in December 1838, the receiver was extended to his cause. Pending the reference under the decree in this cause, and the order of June 1838, in the other causes, T. obtained assignments from C. and W. of the mortgage

and the annuity. On the 11th of November 1839, the Master reported in T.'s cause the sum due to him, and that the mortgage and annuity of C. and W. had been assigned to T., and had not been proved. On the 12th of November 1839, the Master reported all the sums due to N. P.; that C. and W. had filed charges, but declined to prove them; and that the demand of N. P. was prior to the demands for which C. and W. filed their bills. T. now moved on the report in his favor, that the fund in Court should be extended to his cause, and insisted on his priority. N. P. moved that their reported demand should be paid out of the fund, which they insisted should, as to T., be considered as bye-gone rents, having been collected by their diligence in causes to which T. was not a party, and long before T. had obtained a decree or receiver; *Held*, that the fund could not be paid out without regard to the priority of T., and that it should accordingly be extended to all the causes—that a fund in Court is never to be considered as bye-gone rents, but in *custodia legis* for the persons entitled in priority. R. *Murtagh v. Tisdall* 41

3. A receiver under the Sheriffs' Act will be directed to pay a sum of money in his hands to the petitioner, although he has not accounted, where it appears that the petitioner was the only creditor in Court. E.E. *In re* ——— 412

GIFT.

See DEEDS.

- S. L., to whom, by settlement (executed in 1800), an annuity of £200, by way of jointure, was secured in the event of surviving her husband, continued, for many years after her husband's death (which took place in 1809), to receive payment of the same from the hands of her step-son, H. A. L., the inheritor of the estate upon which the annuity was charged. In 1830, the annuity being then two years in arrear, S. L. wrote a letter to her step-son, wherein, after expressing her wish to do what she could to serve him, she stated that she would feel happy in henceforth giving up the £200 annuity which he had paid

her since her husband's death, and would also make him a present of the £400, the amount of the arrears then due.—In 1834 H. A. L. died. By his will he charged his real estates with the payment of an annuity of £200 to his step-mother. By a codicil, however, after stating that he had been most reluctantly constrained by circumstances to alter the bequest, he substituted a reduced annuity of £100 for the annuity of £200 granted by his will. The bequest of the smaller sum was accompanied by a declaration, that it was upon condition that S. L. should not seek to raise the annuity of £200 secured by the settlement of 1800, which, the testator stated, she had, in a letter written long since, expressed her intention to relinquish in his favor.—S. L. died in 1837, having previously made her will, and thereby appointed the plaintiff her residuary legatee and sole executor.—It appeared that S. L. had never sought for or demanded either the annuity secured by the settlement, or that granted by the will, after the date of her letter in 1830.—The plaintiff having filed a bill to raise the arrears of the annuity secured by the settlement, the Court dismissed it, so far as it claimed relief in respect of the arrears which accrued in the lifetime of H. A. L., but directed an account of what was due from his death to the death of S. L. *E. E. Langley v. Langley* 313

GUARDIAN.

See INFANT AND GUARDIAN.

HEARING.

See CAUSE.

HEIR-AT-LAW.

See BILL, 10.

HUSBAND AND WIFE.

1. A wife is an admissible witness against the personal representative of her deceased husband, to charge his assets. *Semble. R. Harwood v. Bland* 11
2. A married woman, entitled to a reversionary life-estate in the event of surviving her husband, cannot, by consenting to waive her interest, give the Court

the power to dispose of it. *C. Batt & Wife v. Cuthbertson* 200

INFANT AND GUARDIAN.

1. Where stock was invested in the name of P. M., an infant, and the bank declined to pay the dividends for want of a sufficient receipt, upon petition of infant's father, stating that the stock was his own money, and had been invested by his wife, since deceased, under misapprehension, that he was in great distress, and needed the dividends for the minor's support, although the minor was not a ward of Court, and no guardian was appointed to him, and no cause was depending in which the order could be made, yet the Court, under the circumstances, ordered the Governor of the Bank to pay the dividends to the father, as the natural guardian of the minor, for his maintenance. *R. In re Murphy* 24
2. In a foreclosure suit, the defendants (some of whom were minors) by their answer relied on the statute of limitations, as disentitling the plaintiff to more than six years' interest. In the progress of the cause, an order was made on consent, in pursuance of which a payment was made to the plaintiff on account of his demand; *Held*, that although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between adults, yet as the interests of minors were concerned, the payment ought to be considered as made without prejudice to the rights, and subject to the equities of the parties in the cause, and ought not therefore to be permitted to defeat the defence relied upon by the answer. *E. E. Thwaites v. Mc'Donough* 97
3. Where the bill was filed to recover the amount of a judgment debt out of the real and personal estate of the conusor: *Held*, that the defendant, who was a minor, and the heir-at-law of the conusor, was not entitled as against the plaintiff to the costs of putting in an answer. *E. E. Downes v. Hogan* 112
4. Where a suit was pending to compel the execution of a lease, when the ancestor, who was a defendant in the cause,

died, and the cause was revived against his heir-at-law, a minor, the Court ordered a reference to the Master, to inquire and report whether it would be for the benefit of the infant, that the suit should be defended in his name or that of his trustee; and if to be defended, what were the funds properly applicable to the defence; and if not to be defended, on what terms it would be proper that it should be amicably settled. R. *Hare v. Mountcashel* 241

5. Where upon petition of the paternal aunt of the minors, it appeared that their mother was dead, and that their father was still living, but was a man of irregular habits, and had lately intermarried with his servant, and that the minors were entitled to real estate in right of their mother, the Court referred it to the Master to approve of a person as receiver of the minor's estate, and also to inquire and report as to proper maintenance to be allowed, and whether or not it would be proper to appoint guardians of their persons and fortunes. R. *In re Cormicks* 264

6. Where A., being about 18 years of age, and possessed of considerable real and personal property, entered a convent, whether as postulant or pupil was controverted, but upon an agreement on the part of the nuns that she should not be professed under age, or without their apprising her friends previously; and it appeared that she was professed under age, and in the absence of all her friends; and there was no evidence of any notice having been given to any of them, save an allegation in the answer of the defendants, that they did communicate the fact to her sister; and afterwards, when she arrived at full age, she assigned nearly all her property to the nuns, for the benefit of the convent; and it appeared that previous to this she had been excluded from the society of her friends, and that the deed for this purpose was prepared by the professional agent of the convent, and that she had no friend of her own present; and having in some time after quitted the convent, she filed a bill to set those proceedings aside, for a reconveyance of her real estate, and for an account;

Held, that the transactions in this case fell within the principle of the cases of guardian and ward, which decide that dealings between them ought not to stand. E. E. *Whyte v. Meade* 420

7. Examination of *prochein amy* of minor plaintiff as a witness for defendant. R. *M'Neice v. Agnew* 445

INJUNCTION.

1. On the 13th of May a report, finding the answer to a bill for an injunction to stay proceedings at law, prolix in certain passages, was sent back to the office to be reviewed, with directions to include therein certain other passages as prolix. On the 6th of June the amended report was confirmed, and on the same day an order was obtained to expunge the matter reported prolix. On the 8th, the defendant issued and served a conditional order to dissolve the injunction, on the ground of having answered the bill. On the 10th, the plaintiff served a notice, cautioning him against proceeding under that order, and requiring him to vacate it; and on the 12th issued a summons to attend before the Officer on the 17th, to have the prolix matter expunged. Under these circumstances, a motion to set aside the conditional order to dissolve the injunction, as irregularly obtained before the prolix matter was actually expunged, was refused with costs. *Semble*—that when an answer is reported prolix, it is not necessary to have the prolix matter actually expunged before the defendant obtains an order to dissolve the injunction upon the coming in of the answer. E. E. *Barry v. Harrison* 64
2. A party to a fraud cannot file a bill against his accomplice to get rid of his liability; therefore, where a collusive sale took place pursuant to an arrangement, whereby it was agreed, that the defendant should pay to the plaintiff's father £20, on condition that defendant should bedecleared the purchaser of the lands at £500; and a bond for £500 was executed by plaintiff's father to the defendant, and deposited with a third party, to be returned to the plaintiff's father in case the sale was confirmed, otherwise to be delivered to the defend-

ant. The £250 was paid, and the sale was confirmed, but the defendant obtained possession of the bond. A bill by the plaintiff, praying that the bond should be delivered up to be cancelled, and an injunction against proceedings at law, was dismissed. *C. Hamilton v. Ball* 191

2. On application for an injunction in a possessory suit, a conditional order for both injunctions to issue (to the party and the sheriff) will be granted. *R. Biddulph v. Molloy* 228
3. This Court will interfere by injunction to protect the copyright of the assignee of the author (the reporter of legal decisions), though it appears that at the time of the alleged piracy, there was not an assignment in writing, and the assignee had a merely equitable title, and that some of the cases were *ex relatione*; and it will disregard a permission from the author to infringe the copyright given after he had parted with his equitable title for valuable consideration, and it had appeared upon the title page of his work that it was printed for the equitable assignee of the copyright. *R. Hodges & Smith v. Welsh* 266

INSPECTION, PRODUCTION, AND EXECUTION OF DEEDS.

1. When in consequence of the defendant's refusal to execute the conveyance to the purchaser under the decree, it becomes necessary to apply, that the Master may execute in their names; the estate is not to bear the costs of such application, but the defendants, whose improper refusal made it necessary. *R. Clarke v. De Burgh* 19
2. Where the tenant of a minor's estate obtained an order of reference, as to renewal of the lease under which he held, and the order directed *inter alia* that the minor's costs of the reference should be paid by the tenant; upon the reference, the guardian of the minor insisted that he was not entitled to a renewal without payment of renewal fines, and a protracted litigation ensued, whereby the costs of the reference was trebled on both sides; and it appeared that the tenant was entitled to renewal without fine, and that he had been pay-

ing in his own wrong for several years on account of renewal fines, sums amounting to £300. The Court ordered that the guardian should execute the renewal without requiring payment of the costs of the reference. *R. Campbell v. Bryan* 54

3. The Court has jurisdiction under a decree, binding the client to order his solicitor to bring in the deeds of his client in his possession, although he never appeared in the cause, and it is uncertain what time the deed came into his possession. *Semble. R. Hargrave v. Holland* 137
4. Bill filed in February 1836, for specific performance of an agreement for a lease; answer filed in the course of the same year, insisting that the contract could not be performed, as it exceeded his leasing powers, and also setting out two settlements of the estate, to which he craved leave to refer when produced, but did not admit they were in his possession. The answer having been unexcepted to, and issue having been joined, the defendant served notice on the plaintiff in 1837, requiring him to admit one of the settlements, which then lay at his solicitor's office for inspection. After several witnesses had been examined, the plaintiff now moved that he should be at liberty to inspect the two deeds relied upon in the defendant's answer, or, if necessary, that he might amend his bill for the purpose of procuring sufficient admissions from the defendant that the deeds were in his possession. The motion was refused with costs. The proper mode for raising the question, as to whether the plaintiff had a right to inspect the deeds, should have been by excepting to the answer for not admitting the possession. *R. O'Connell v. Denny* 246

INSOLVENT.

See BILL, 15, 20.
Costs, 5.

INTEREST.

1. On a decree for a specific performance to purchase lands, the general rule is that the purchase money carries interest, from the day when the contract ought

to have been performed. But in a suit against an executor for specific performance of a contract by his testator to purchase lands, the plaintiff having taken a decree on consent for specific performance; and a reference to take an account of real and personal assets, was held entitled to interest only from the date of the report, the executor having admitted assets by his answer, and the accounts having been unnecessarily taken. *C. Enraght v. Fitzgerald* 87

2. Upon the true construction of the 3 & 4 *W. 4*, c. 27, s. 42, more than six years' interest cannot be charged upon land in respect of a sum of money secured by judgment. *Per Foster, B. E.E. O'Kelly v. Bodkin* 361
3. The Court will not allow interest on a judgment obtained upon bills of exchange, where the plaintiff seeks his remedy by petition for a receiver under the 5 & 6 *W. 4*, c. 55. *In re Southkeys v. Bateman* 361

JUDGMENT.

1. A solicitor transacting business for his client, and having at the same time a judgment against him bearing interest—the client having made general payments from time to time, the solicitor was held justified in applying those payments to his account for costs accruing due, although the interest on the judgment against his client was accumulating at the same time. *C. D'Arcy v. Burke* 1
2. Where a *prius* judgment creditor was in possession, under an *elegit*, of a small portion called P., of the conusor's estate, and a prior judgment creditor, proceeding under the judgment act, sought a receiver over the lands of P. only, stating as to the rest of the estate, viz., the lands of K., that persons were in possession for payment of prior charges. A conditional order having been obtained and the *elegit* creditors having come in to shew cause, charging that the petitioners were in collusion with the respondents, and that all the lands of K. were not subject to prior charges; and, therefore, insisting that the petitioners should go against these lands, and not disturb him; *Held*, that there being no

evidence of collusion, the prior creditor should not be put to search whether any of the lands of K. were unaffected by the prior charges, when there were the lands of P. in the possession of a creditor by an inferior title. That the judgment creditor proceeding under the judgment act, is to be considered entitled to all the rights of priority he should have had, if he had sued out an *elegit* at law; and that the act was intended not to abridge but to facilitate and extend such pre-existing legal rights; therefore, the cause shewn disallowed, and conditional order made absolute. *R. Harnett v. Harnett* 20

3. In 1834, P., being a trader, passed his bond and warrant, &c., to secure £450 to B., who entered judgment under the warrant, as of the following Trinity Term. In 1839, B. having duly revived and presented a petition under the 5 & 6 *W. 4*, c. 55, for a receiver, and on the 24th of April obtained a conditional order, which was made absolute on the 15th of May, when it was referred to the Master to approve of a proper person, and on the 12th of June the Master's report approving of R. as receiver was confirmed, and the tenants ordered to pay him. Pending those proceedings, P. being a trader, committed an act of bankruptcy by lying in prison from the 1st to the 22d of May, twenty-one days. On the 27th of May a commission of bankruptcy issued against him, and on the 10th of June he was declared a bankrupt under the commission. On motion of the assignee for the removal of the receiver, and payment of the rents received; *Held*, that a judgment on warrant of attorney by a trader is to be considered a judgment *by confession*, within the meaning of the 6 *W. 4*, c. 14, s. 126 (bankrupt act). That a judgment creditor having an order for the appointment of a receiver, under the 5 & 6 *W. 4*, c. 55, s. 37, continues to be, notwithstanding such order, a creditor, having security for his debt, within the meaning of 6 *W. 4*, c. 14, s. 26, until the rents have been paid over to him in satisfaction of his demand; and, therefore, the appointment of the receiver in this case

- being on a judgment on warrant of attorney, was overreached by the bankruptcy, and that the receiver should be removed. *Sembla.*—The absolute order of the 15th of May was the order for appointment of the receiver, within the 5 & 6 W. 4, c. 55, s. 37. R. *Baker v. Pettigree* 144
4. Notwithstanding the 3 & 4 W. 4, c. 27, s. 40, the revival of a judgment by *scire facias* within twenty years is sufficient to enable a party to proceed, at law or equity, for recovery of the sum thereby secured, although more than twenty years have elapsed since the rendition of the original judgment. *Ryan v. Cambie* 328
5. A judgment creditor, who, after the death of the conusor, issues an *elegit* and obtains a finding thereunder, but who is prevented from getting into possession of the lands by the proceedings of a prior creditor, is not thereby debarred from resorting to another remedy for recovery of his demand. *Ibid.*
6. *Sed quære*—Whether a judgment creditor, who proceeds by *elegit* after the death of the conusor, and gets into possession of a moiety of his debtor's freehold property, and who is not disturbed in that possession, can abandon his *elegit* proceedings, and file a bill in equity for the recovery of his demand by a sale of his debtor's freehold estates? *Ibid.*
7. If the revival of a judgment be good against the terretenants, it is equally so against all persons not terretenants, or in possession, who may have remote or contingent interests in the lands. *Ibid.*
8. Where a creditor's suit was commenced before the passing of the 3 & 4 W. 4, c. 27; *Held*, that the claim of a judgment creditor who subsequently came in and proved his debt in due course under the decree was unaffected by the operation of that statute.—Had it been necessary to make a special application to the Court for liberty to prove the debt, grounded upon a denial of the creditor's knowledge of the existence of the suit, it would have been otherwise. E. E. *O'Kelly v. Bodkin* 361
9. The Court will not allow interest on a judgment obtained upon bills of exchange, where the plaintiff seeks his

remedy by petition for a receiver under the 5 & 6 W. 4, c. 55. *Southey v. Bateman* 361

JURISDICTION.

See BILL, 11.

1. An order made in a lunatic matter may be carried into effect though the lunatic dies after the order pronounced. After the death of the lunatic, being tenant for life, an order made in his lifetime, affecting the rights of the remainderman who has entered since the death of the lunatic, cannot be enforced; therefore, when the tenant for life, having a leasing power, makes an agreement for a lease, and afterwards becomes lunatic; by an order in the lunacy matter; the contract for a lease ordered to be executed; lunatic then dies; petition in the lunacy praying to carry order into effect, refused; the Court's jurisdiction being at an end. C. *In re Kingston* 169
2. Parties claiming under a voluntary settlement may file a bill in equity to obtain a declaration of their rights as against the settlor. C. *Gannon v. White* 207
3. Although an executor who has once acted by meddling with the assets, cannot by subsequent renunciation, or the grant of administration to another, be divested of the liability of an executor; yet if when required to prove the will and administer, he refuses to do so, the Ecclesiastical Court may commit the administration to another, who will, so long as the grant continues, be to all intents and purposes a lawful administrator, whose lawful acts shall remain valid and effectual, though the grant of administration be afterwards revoked. R. *Per Sir M. O'LOUGHLIN, M. R. Howlett v. Lambert* 261
4. The Court has jurisdiction to authorise the establishment of a charity *cy-pres* on a petition presented under the 52 G. 3, c. 101. E. E. *In re Lady Belvedere's Charity* 354
5. Bill for specific performance of an agreement to grant a lease and for an injunction to restrain execution of an *habere*. On the coming in of the answer the injunction was continued on the terms of plaintiffs giving security for the

mesne rates by recognizance. On the hearing of the cause the bill was dismissed with costs, whereupon the defendant brought an action for the *mesne* rates against the plaintiffs, and recovered judgment at law. Upon motion of the defendant's executor, the plaintiffs were ordered to pay the amount of the judgment within ten sitting days after service of the order.—Notwithstanding the dismissal of the bill, the Court retains jurisdiction to make such an order, the recognizance being substituted, in case of the plaintiff, for an actual lodgment of the money in Court, in which case the Court, even after the dismissal of the bill, would have jurisdiction to make an order for payment of the money.

E. E. *Popham v. Baldwin* 356

6. This cause being set down for hearing, and in the Lord Chancellor's list for the day, the plaintiff attended in Court until the Court rose, but the cause was not called on. Upon leaving Court he called at his place of business, and remained there about an hour and an half sorting his papers and making other preparations for the hearing of the cause, and when proceeding from thence homewards, was arrested under a *ca. sa.* issued out of the Exchequer for a large amount. *Held*, that he was privileged and should be discharged. *Held, also*, that he was entitled to apply to this Court for his discharge. R. *Ahearne v. McGuire* 437
7. A principal defendant having come to town for the hearing of a cause in the Lord Chancellor's list, and having been, on his way from his hotel to his solicitor's office, arrested under *capias ad resp.* *Held*, that he was privileged and should be discharged, although he had deviated and remained a little for his amusement. *Held also*, that although the cause for which the defendant came to town was to be heard by the Lord Chancellor, yet as it was generally depending in Chancery, the Master of the Rolls might make the order allowing the defendant privilege and ordering his discharge. R. *Mahon v. Mahon* 440
8. Where the deed reserving a fee-farm rent out of certain lands thereby conveyed in fee was of ancient date, and

the rent after various *mesne* assignments was vested in the plaintiff as assignee, and was in arrear; and the estate conveyed by the deed, after various *mesne* assignments, was vested in the defendant as assignee:—Upon a bill by the assignee of the rent praying a receiver &c.; and the defendant's answer admitting the plaintiff's title, but insisting that his remedy was at law, the Court granted a receiver over the premises conveyed by the deed to pay the arrears and future accruing gales of the rent, although the deed contained clauses of distress and re-entry in case of non-payment. R. *Stevelly v. Murphy* 448

LANDLORD AND TENANT.

See AGREEMENT, 1.

1. It is no objection to a bill of interpleader by tenant, that it appears by his bill that the rent was adversely demanded by two persons, one of whom had a *prima facie* legal right to receive it, as devisee and executrix of the lessor, and the other a mere equitable claim as heir-at-law, where the adverse claimants were litigating, and the tenant threatened with distress. The tenant, though not a party in the principal cause, may, upon notice in the cause, apply for an injunction without putting the estate to the expense of an interpleader suit. R. *Doran v. Everitt. Byrne v. Everitt* 28
2. Where there was a written contract for a lease at a certain rent, and the tenant held under it, but afterwards sought and obtained a reduction of rent, and being unwilling to bind himself to the rent reserved in the contract, omitted to execute the lease for several years, while the landlord was willing to grant it, he cannot afterwards, when the landlord serves notice to quit, fall back on the contract, which by his acts he had repudiated, and enforce the execution of the lease. Where a tenant has held lands under an agreement for a lease, and the landlord considers that the tenant has abandoned or forfeited his rights under the contract, the practice in Ireland is to bring an ejectment, and the landlord ought not to commence dealings with the under-tenants in occupation of the lands until he has re-

covered at law. *C. Garrett v. Besborough* 180

3. Where A., the heir-at-law, and the devisees under the will of his ancestor, claimed the reversion, and the former served notice upon the tenants to pay the accruing rents to him, and the devisees recovered by distress the first and second gales that fell due; one of the tenants, before the third gale became due, filed a bill of interpleader; *Held*, that he was entitled to do so, and to pay the rent into Court, although the heir-at-law insisted that the lease under which the tenant held was void against him. *C. Rickard v. Hyde* 299

4. Bill for specific performance of a lease for 21 years, and for an account. It appeared that the defendant held the lands for one life; that the agreement was executed by the agent of the defendant, and possession given under it, and money expended in improvements; but the defendant swore that her agent had no authority from her to do so. There was also evidence of her having subsequently recognised the agreement, and promised to execute a lease pursuant thereto. It appeared that a civil bill ejectment was served upon the plaintiff, and another upon two of his under-tenants. The former was dismissed but the latter being undefended, a decree was obtained thereon, under which he was turned out of possession. In about three years afterwards this bill was filed. Pending the proceedings, the *cestui que vie* in the defendant's lease died: *Held*, That the plaintiff was entitled to an account of the rents and profits of these lands which the defendant had received, or which, without wilful default, she might have received from the day of the execution of the civil bill decree, up to the day of the death of the *cestui que vie*.—In this case the Court would decree a specific performance, if the defendant's interest had not expired.—*Semble*. *E. E. Callaghan v. Pepper* 399

Upon an application for a receiver under the 5 & 6 W. 4, c. 55, over premises held under a lease, the tenant's interest in which had been evicted by ejectment for non-payment of rent, but

the time for redemption had not expired; the Court will make an order for a receiver, the petitioner undertaking to pay the sum due to the landlord for debt and costs, and will not put the party to a redemption bill. *E. E. In re Executors of Hill v. Kerr* 410

LIMITATIONS, STATUTE OF

1. In a foreclosure suit the defendants (some of whom were minors) by their answer relied on the statute of limitations, as disentitling the plaintiff to more than six years' interest. In the progress of the cause an order was made on consent, in pursuance of which a payment was made to the plaintiff on account of his demand; *Held*, that although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between adults, yet as the interests of minors were concerned, the payment ought to be considered as made without prejudice to the rights, and subject to the equities of the parties in the cause, and ought not therefore to be permitted to defeat the defence relied upon by the answer. *E. E. Thwaites v. M'Donogh* 97
2. It is now finally settled that in a will of personalty, a trust for payment of debts cannot save them from the operation of the statute of limitations. *Per Sir M. O'LOUGHLIN. Howlett v. Lambert* 262
3. A. being entitled to a mortgage on certain lands vested in a trustee for him, agreed that a subsequent annuity creditor should have precedence over his debt, and joined in a demise of the lands to a trustee for the annuitant; but his trustee, who had the legal estate, did not join in the demise. A remained in possession until the death of the grantor of the annuity; *Held*, that the annuitant was not debarred from recovering more than six years' arrears, but that he came strictly within the exception in the 42d section of the 3 & 4 W. 4, c. 2. *C. Drought v. Jones* 303
4. Where the bill prayed an account on foot of two bills of exchange accepted by A., deceased, and due and unpaid at the time of his death, and of the costs

- and expenses incurred by the plaintiff as administrator of A. down to the time when the grant of administration was revoked; and that the amount of the bills due to the plaintiff as a creditor of A., and of the plaintiff's expenses as administrator, might be paid out of A.'s personal estate. It appeared that A. had no real estate. The expenses, &c., consisted nearly altogether of the plaintiff's costs in a cause instituted by him as administrator in 1838, for discovery of assets, which after issue joined and publication passed, was frustrated by the present defendants, who were also defendants in that cause, and who being A.'s next of kin, and in possession of his assets, for the purpose of avoiding a decree, lodged in the Prerogative Court the will of A. which they had previously suppressed, and procured a revocation of the grant of administration to the plaintiff and a new grant to themselves *cum testis annexo*. They now pleaded the statute of limitations as to the bills of exchange, and demurred generally to so much of the bill as sought an account, &c., of the plaintiff's costs and expenses as administrator; *Held*, that the plea should be allowed, as the plaintiff did not appear to have been under disability, and had not proceeded for his demand within six years after the right of action accrued. *R. Howlett v. Lambert* 254
5. When time begins to run in the debtor's lifetime, it does not, upon his death, stop until a personal representative is raised, but still runs on. *Ibid* 263
6. Whether it is necessary to rely on the statute of limitations in the answer, in order to entitle a party to set it up in the office, *quere*. *C. Drought v. Jones* 303
7. I am not bound to give to a section creating a flat statutable bar (the statute of limitations), a stringent construction which does not necessarily follow from that section. *Per Lord PLUNKET*, in *Ibid* 307
8. Notwithstanding the 3 & 4 W. 4, c. 27, s. 40, the revival of a judgment by *scire facias* within twenty years is sufficient to enable a party to proceed, at law or in equity, for recovery of the sum thereby secured, although more than twenty years have elapsed since the rendition of the original judgment. *E.E. Ryan v. Cambie* 328
9. Where a creditor's suit was commenced before the passing of the 3 & 4 W. 4, c. 27, *Held*, that the claim of a judgment creditor who subsequently came in and proved his debt in due course under the decree, was unaffected by the operation of that statute.—Had it been necessary to make a special application to the Court for liberty to prove the debt, grounded upon a denial of the creditor's knowledge of the existence of the suit, it would have been otherwise. *E.E. O'Kelly v. Bodkin* 361
10. Upon the true construction of the 3 & 4 W. 4, c. 27, s. 42, more than six years' interest cannot be charged upon land in respect of a sum of money secured by judgment. *Per FOSTER*, *B. Ibid.*
11. Where a defendant seeks to have the advantage of the 3 & 4 W. 4, c. 27, s. 42 (statute of limitations), he must in general rely upon it in his pleading.—*Semble*. But where a third party (the mortgagee of the person who created the charge, to raise which the bill was filed), omitted to rely upon the statute expressly, but denied the existence of the debt in his answer in such terms as was considered to amount substantially to a reliance upon the statute, the Court would not deprive him of the benefit of the statute; but holding that the question upon the bar of the statute was for the Court, and not for the Officer, the plaintiff, under the circumstances, was allowed to make out any case he was able before the Officer, to bring his claim within either of the exceptions in the act, and the Officer was directed to report specially thereon. *E.E. Cummins v. Adams* 393
12. In all cases previous to the recent statute, if the defendant meant to rely upon the statute of limitations, he should do so in his pleading. *E.E. Ibid* 395

LUNACY.

See JURISDICTION, 1.

MASTER AND REMEMBRANCER.

1. *Their Report*.

1. Where the Remembrancer signs a draft

report, and directs it to be served on the parties, unless objections be taken to it in four running days, it is signed as a final report; but no objection can be taken to an interlocutory report, and the mode of questioning it is, by moving to set it aside, or to have it sent back to be reviewed. *Per* PENNEFATHER. *B. Barry v. Harrison* 61

2. The duty of the Officer (Remembrancer) is merely *ad computandum*, and it is not his province to adjust nice equities between the parties in a cause. *Per* RICHARDS, *B. Ibid. Thwaites v. M'Donough* 102

3. Where objections have been taken in the office against Remembrancer's Report, it is irregular to set down the cause to be heard on report and merits, until the report is confirmed, unless the objections to the draft report have been allowed, and the report as signed varied accordingly. *E. R. Warren v. Power* 107

4. Where a party who has had an opportunity of excepting to the Master's report, presents a petition of re-hearing, praying that the decree may be reversed, he cannot object to the decree on the grounds appearing upon the report. *C. Brownlow v. Earl of Meath* 383

II. Reference to.

5. Where lands were apportioned with tithe composition for two parishes, the Court, upon a petition presented under the 1 & 2 V. c. 109, s. 16, referred it to the Remembrancer to inquire and report in which of the parishes the lands were situated, and whether they were doubly charged with the rent-charge, and if so, for which of said parishes they had been rightfully charged with tithe composition. *E. E. Armstrong v. Pepper* 89

6. Where a suit was pending to compel the execution of a lease, when the ancestor, who was a defendant in the cause, died, and the cause was revived against his heir-at-law, a minor, the Court ordered a reference to the Master, to inquire and report whether it would be for the benefit of the infant, that the suit should be defended in his name, or that of his trustee; and if to be defended, what were the funds properly applica-

ble to the defence; and if not to be defended, on what terms it would be proper that it should be amicably settled.

R. Hare v. Mountcashel 241

7. Where upon petition of the paternal aunt of the minors, it appeared that their mother was dead, and that their father was still living, but was a man of irregular habits, and had lately intermarried with his servant, and that the minors were entitled to real estate in right of their mother, the Court referred it to the Master to approve of a person as receiver of the minor's estate, and also to inquire and report as to proper maintenance to be allowed, and whether or not it would be proper to appoint guardians of their persons and fortunes. *R. In re Cormicks* 264

8. Where the receiver under the Sheriffs' act applied for an attachment against a tenant for not paying rent, and it appeared that the respondent made a lease of the premises in question to the tenant, and that a declaration of trust was entered into, contemporaneously with that, to the effect that the tenant held in trust for A., who it appeared had an incumbrance affecting the respondent's estate prior to any of the judgments which formed the subject-matter of the petitioner's claims; the Court directed a reference to the Remembrancer to inquire and report as to A.'s rights. *E. E. In re Monahan v. Kernan* 408

MESNE RATES.

See BILL, 22.

MONEY.

See FUND AND FUNDS IN COURT.

MORTGAGE.

1. Where an estate *pour autre vie* is granted in mortgage, and mortgagor and mortgagee jointly make a lease of a portion of the mortgaged premises, reserving rent to both the lessors, and to their heirs and assigns; and the lessee covenants for the payment of the rent accordingly; on the death of the mortgagee the mortgagor may maintain an action of covenant for non-payment of the rent, which accrues due in his own lifetime, the covenant being *quoad*

the mortgagor a covenant in gross; but *semble*, that the rent which accrues due subsequently to his death goes to the heir-at-law of the mortgagee, who may sue upon the covenant notwithstanding the mortgagor having survived the mortgagee; for the Court will mould such a covenant so as to make the rent go, on the death of the survivor of the lessors, to the party entitled to the reversion. *E. E. Thwaites v. M'Donough* 97

2. A payment of the mortgage money before the day limited by the deed, to the general agent of the mortgagee, but without the mortgagee having authorised a premature repayment, and without his privity, is not a good discharge of the mortgage debt. *C. Burrough v. Cranston* 203

3. It is not necessary, nor incident to the character of such an agent, to receive the mortgage debt. *Ibid* 206

4. The bill stated a mortgage made by the defendant in consideration of £219, and "that the said mortgage contains a proviso for redemption in favor of the said defendant, his heirs, executors, and administrators, upon his or their "at any time paying the said £219 with "interest, as by said indenture in plaintiff's possession, and to which they "crave leave to refer, when produced, "will appear;" and prayed an account of the sum due, and that the defendant might be foreclosed of all equity of redemption, and for a sale; and that the defendant might be ordered to bring in the title deeds. To this bill a general demurrer was allowed, as it appeared by the bill that this was in the nature of a Welsh mortgage; and no case was shewn entitling the plaintiffs to have a sale independently of a foreclosure; and it did not appear that the title deeds were sought otherwise than for the purposes of the foreclosure and sale, to neither of which were the plaintiffs entitled by their bill. *R. O'Connell v. Cummins* 251

5. In a suit to foreclose a mortgage, after the death of the mortgagee, it appeared that the mortgagee had bequeathed the mortgage debt in different portions, to several persons, and amongst those £2000 had been bequeathed to A. and

B., and the survivor of them, his executors, &c.; the personal representative of the survivor had been made a defendant, and £2000 was reported due to him: *Held*, That he was entitled to be paid his costs according to the priority of his demand, notwithstanding that the general rule of the Court in foreclosure suits was to allow only one set of costs against the inheritance. *E. E. Cane v. Brownrigg and others* 413

6. In the Court of Equity Exchequer, a *pui*sne mortgagee need not, in a bill for foreclosure and sale, offer to redeem a prior mortgage; the *pui*sne mortgagee may insist on the sale, and the prior mortgagee cannot resist it, but the prior mortgagee must be paid his debt and costs of suit first: if, however, there be a judgment or other incumbrance prior to the first mortgage, such prior incumbrance must be paid out of the purchase-money, and that in priority even to the prior mortgagee: and this rule holds good, even though such judgment or other prior incumbrance happens to be vested in the *pui*sne mortgagee who files the bill for a foreclosure and sale. In the Court of Chancery, the *pui*sne mortgagee must by his bill offer to redeem the mortgage. *E. E. Perrott v. O'Halloran* 428

MOTION.

I. Generally.

1. By the practice of this Court, a supplemental affidavit cannot be used upon a motion to make a conditional order absolute. *E. E. Smithwick v. Bradshaw* 94
2. A motion for an order upon a receiver to pay over a certain sum in his hands, is not strictly a money motion; therefore, where such a motion was moved when the Court were in money motions, in the absence of counsel who had a brief to oppose it, the motion was reheard. *E. E. Anonymous* 417

II. Notice of.

3. When a notice of a motion is personally served on a party out of Court, it should be of a motion to be made on a particular day, and not on "the first opportunity." *R. Creed v. Creed* 32
4. Notice of motion for liberty to execute a sequestration upon a decree is necessary, where it is sought to execute it

- against lands. E. E. *Welsh v. Welsh* 360
5. A motion to renew an order in a cause must be upon notice. E. E. *Brown v. Lynch* 411
6. A notice of motion to have a receiver's account sent back to be reviewed, must specify the items objected to: it is not sufficient to refer for them to the affidavit used upon the motion. A motion to vacate the recognizance, at the same time that the receiver applies to be discharged, is premature. E. E. *D'Arcy v. Sherry* 411
7. A motion on behalf of sequestrators, to lodge money, must be upon notice. E. E. *Byrne v. Langmore* 411
8. A notice of a money motion moveable the last of the eight equity days is too late; it must be served in time to be moved the last day but one. E. E. *O'Ferrall v. Madden* 416
9. A notice of a money motion moveable the last of the eight equity days, is too late; it must be served in time to be moved the last day but one; and the consent of all the parties interested in the funds will not vary the rule. E. E. *Anonymous* 417
10. Upon an application for liberty to issue a sequestration for the costs of dismissing a bill, if the party be going against personal property, notice of the motion need not be given:—*Secus*, where the party is going against real property. E. E. *O'Brien v. Foley* 418
11. Where it appears by the bill that the plaintiffs are resident out of the jurisdiction, the defendant's motion, that proceedings may be stayed until the plaintiffs give security for costs, is a motion of course. R. *Yarborough v. Brazier*. 463

NOTICE.

In a foreclosure suit B. F. claimed under a mortgage of the equity of redemption, executed by the defendants in February 1839, and duly registered on the 7th of that month. The mortgage was obtained for the purpose of securing a debt due to B. F. from the mortgagors, and which had been previously secured in 1825 by the bond of D. who then held the mortgaged premises in trust for the mortgagors. Upon the

death of D. the premises (which were chattel) were assigned to the *cestui que trusts* by his personal representatives. The priority of B. F. under her mortgage was disputed by certain simple contract creditors of the mortgagors, who having brought actions at law, had agreed that the proceedings in such actions should cease upon the terms contained in a consent, bearing date the 19th January 1839, and which was made a rule of Court on the 2d of February following—namely, that they should be paid their respective demands, when proved, together with costs, out of the produce to be realised by a sale of the mortgaged premises after payment of prior incumbrances. It appeared that the attorney acting for B. F. in procuring the execution of the mortgage to her, not only knew of the rights and had notice of the proceedings of the other creditors, but was in fact an active agent for the defendants (the mortgagors), in effectuating the arrangement whereby the other creditors had been induced to relinquish their proceedings at law, upon the terms contained in the consent. *Held*, that such notice to B. F.'s attorney was sufficient to prevent her (although unaffected by *personal* notice) from gaining a priority by force of the registry of her mortgage deed over the other creditors who had acquired a prior equitable lien on the land by virtue of the consent. *Held also*, under the circumstances, that B. F. had no equitable right or claim (as against the consent-creditors) to the mortgaged premises in respect of their having been the assets of D., the obligor in the bond of 1825. *Seemle*, that under no circumstances, would B. F. have had such an equity, as it was competent for the representatives of D. upon his death to assign over to *cestui que trusts* the trust premises, without their being in the first instance subject to the debt due to B. F. —Notice to an attorney or agent is not to be considered as implied or constructive notice merely, which is properly referable to something that a party or his agent ought, if reasonable diligence had been used on his behalf, to have acquired a knowledge of, but which

NOTICE.

possibly neither he nor his agent ever did know or acquire any knowledge of. —The general proposition that notice to an agent so as to affect his principal, must be in the same transaction, admits of certain qualifications. E. E. *Executors of Lenehan v. McCabe* 342

NOTICE OF MOTION.

See MOTION II.

ORDER.

1. Supplemental affidavits cannot be used upon motion to make a conditional order absolute. E. E. *Smithwick v. Bradshaw* 94
2. An order made in a lunatic matter may be carried into effect though the lunatic dies after the order pronounced. After the death of the lunatic, being tenant for life, an order made in his lifetime, affecting the rights of the remainder-man who has entered since the death of the lunatic, cannot be enforced; therefore, when the tenant for life, having a leasing power, makes an agreement for a lease, and afterwards become lunatic; by an order in the lunacy matter, the contract for a lease ordered to be executed; lunatic then dies; petition in the lunacy praying to carry order into effect, refused; the Court's jurisdiction being at an end. E. E. *In re Kingston* 169
3. The general order of the Court directing the receiver to pay the tithe rent-charge, amounts to an order to pay in each particular case. E. E. *Brown v. Brown* 409
4. A motion to renew an order in a cause must be upon notice. E. E. *Browne v. Lynch* 411
5. A conditional order for a receiver will be discharged, if there be no verifying affidavit by the attorney as to the service of the conditional order. E. E. *In re Keogh v. Keogh* 412

PARENT AND CHILD.

See POWERS.

PAYING MONEY INTO COURT.

See BILL, 10.

JURISDICTION, 5.

PETITION.

See CAUSE, SETTING DOWN AND HEARING.

PLEADING.

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PLAINTIFF.

See ARREST, 1, 2.

PLEADING.

See ANSWER.

BILL.

I. Bill.

1. To an amended bill (filed after answer) stating certain matters, some of which appeared prior, and others subsequent to the filing of the original bill, but not re-stating the plaintiff's whole case as he intended it to appear on the record, the defendant demurred, specially upon the grounds that it was in violation of the 51st and 52d General Order, and the demurrer was allowed. R. *Mount-norris v Fetherston* 221
2. It is irregular to introduce in a supplemental bill filed after issue joined, and before hearing, charges contained in the original bill; demurrer on that ground allowed. R. *Richards v. Page* 223
3. The bill stated a mortgage made by the defendant in consideration of £219, and "that the said mortgage contains a proviso for redemption, in favor of the said defendant, his heirs, executors, and administrators, upon his or their at any time paying off the said £219 with interest, as by said indenture in plaintiffs' possession, and to which they crave leave to refer, when produced, will appear;" and prayed an account of the sum due, and that the defendant might be foreclosed of all equity of redemption, and for a sale; and that the defendant might be ordered to bring in the title deeds. To this bill a general demurrer was allowed, as it appeared by the bill that this was in the nature of a Welsh mortgage; and no case was shewn entitling the plaintiffs to have a sale independently of a foreclosure; and it did not appear that the title deeds were sought otherwise than for the purposes of the foreclosure and sale, to neither of which were the plaintiffs entitled by their bill. R. *O'Connell v. Cummins* 251
4. Where the bill contained a charge, "That A., the surviving executor of B. was long since dead intestate, although plaintiff has made inquiry, he cannot now set forth the name of the person

- "who, plaintiff is informed, administered to the said B. with his will annexed, "since the death of said executors; and "plaintiff has applied to the several "confederates herein named for discovery of the name of such administrator, but which, although well known "to them, they refuse to discover."—Demurrer, because B.'s personal representative (who was confessedly a necessary party) was not made a party to the bill, overruled, a sufficient excuse for not making him a party being suggested by the bill. *E. E. Ryan v. Cambie* 328
5. If the frame and prayer of a bill be essentially that of a creditor's bill, the omission of the usual introductory statement, that it was filed on behalf of the plaintiff and the other creditors who should come in and contribute, &c., is immaterial, such averment being matter of form merely. *E. E. O'Kelly v. Bodkin* 361
6. In the Court of Equity Exchequer, a *puisne* mortgagee need not, in a bill for foreclosure and sale, offer to redeem a prior mortgage, the *puisne* mortgagee may insist on the sale, and the prior mortgagee cannot resist it, but the prior mortgagee must be paid his debt and costs of suit first. If, however, there be a judgment or other incumbrance prior to the first mortgage, such prior incumbrance must be paid out of the purchase-money, and that in priority even to the prior mortgagee; and this rule holds good, even though such judgment or other prior incumbrance happens to be vested in the *puisne* mortgagee who files the bill for a foreclosure and sale. In the Court of Chancery, the *puisne* mortgagee must by his bill offer to redeem the prior mortgage. *E. E. Perrott v. O'Halloran* 428

II. Answer.

7. An answer setting forth *in hæc verba* documents, which are not set forth in compliance with any requisition in the bill, nor shewn by the answer to be material to the defendant's case, is prolix, even though the bill pray for an injunction, and the documents may be in point of fact material to the defendant's case. When a bill praying for an injunction required the defendant to set forth in a schedule to his answer a full,

- true, and particular account of all and singular the goods and chattels, &c., and property of every nature of which A. B. died possessed of, &c., their nature, amount, particulars, items, and descriptions thereof, whether in monies, &c., and specifying item by item of what the same consisted, &c., and the quantity, quality, and value thereof, &c.; *Held*, that a very long schedule to the answer, setting forth with the utmost minuteness the particulars and amount of property, was not prolix—this mode of answering having been induced by the minute and searching nature of the interrogatory. *E. E. Barry v. Harrison* 60
8. Whether it is necessary to rely on the statute of limitations in the answer, in order to entitle a party to set it up in the office, *quære*. *E. E. Drought v. Jones* 303
9. Where a defendant seeks to have the advantage of the 3 & 4 W. 4. c. 27, s. 42 (statute of limitations), he must in general rely upon it in his pleading. *Semble*.—But where a third party (the mortgagee of the person who created the charge, to raise which the bill was filed), omitted to rely upon the statute expressly, but denied the existence of the debt in his answer in such terms as was considered to amount substantially to a reliance upon the statute, the Court would not deprive him of the benefit of the statute; but holding that the question, upon the bar of the statute, was for the Court, and not for the Officer, the plaintiff, under the circumstances, was allowed to make out any case he was able before the Officer, to bring his claim within either of the exceptions in the act, and the Officer was directed to report specially thereon. *E. E. Cummins v. Adams* 393
10. In all cases previous to the recent statute, if the defendant meant to rely upon the statute of limitations, he should do so in his pleading. *Ibid.* 395

III. Parties.

See *ante*, PLEADING, 1, 4.

11. In a suit for the arrears of tithe composition in the name of the sequestrator of a parish, there is no substantial reason why the Bishop of the diocese should be made a party. *E. E. Egan v. Doherty* 68

12. If the mortgagee of lands, subject to an annuity, file a bill of foreclosure, and makes the annuitant a party, the bill will be dismissed with costs as to the annuitant, for he is an unnecessary party. *C. Paynes v. Creagh* 190

POWERS.

Where a power is given to appoint a fund among the children as the parent shall direct, and one of the children is advanced by the parent out of his own funds, a portion equivalent to the share which such child would have taken in the settled fund if no appointment had been made, the effect of it is to increase the shares of the other children, and not to make the advanced child's share part of the parent's assets. *C. Brownlow v. Earl of Meath* 383

PRINCIPAL AND AGENT.

See NOTICE.

1. The affidavit of an agent will not be admitted to verify a petition under the sheriffs' act, unless a strong case be made for dispensing with the oath of the principal. *C. Sligo v. O'Malley* 169
2. A payment of the mortgage money before the day limited by the deed to the general agent of the mortgagee, but without the mortgagee having authorised premature repayment, and without his privity, is not a good discharge of the mortgage debt. *C. Burrough v. Cranston* 203
3. It is not necessary, nor incident to the character of such an agent, to receive the mortgage debt. *Ibid.* 206
4. The authority of an agent to contract for a lease of lands need not be in writing.—A proposal in writing for a lease to an agent, who has not power to enter into a contract for such lease, may be acknowledged by *parol* by the principal, so as to be binding on the principal. *Semble. E. E. Callaghan v. Pepper* 399

PRINCIPAL AND SURETY.

1. A creditor having the security, by bond, of a third person for the due accounting of an agent, settled accounts with that agent, and takes from him a bond for the balance found to be due, and bills at different dates for the amount of the bond and the interest thereon, until the

last of the bills should fall due; and at the same time stipulates that he is at liberty at any moment to proceed on the original security; *Held*, that this was not a discharge of the surety. *C. Lindsay v. Donnes* 307

2. The usual way of putting the question as to the discharge of a surety, namely whether time has been given, is a foolish way of putting it; and the Courts are obliged to admit that, when they rest their decisions upon the point, that there has or has not been a binding contract to give time. The real question is, whether by the dealings between the creditor and principal debtor, the former has changed the situation of the surety to such an extent as to injure his chance of recovering the amount of the debt from the principal, by proceeding in the name of the creditor, in case he were to pay that amount himself to the creditor. *Per Lord PLUNKET, in Ibid.* 312

PRIORITY.

See COSTS.

FUNDS AND FUND IN COURT.
JUDGMENT, 2.

1. In a foreclose suit B. F. claimed under a mortgage of the equity of redemption, executed by the defendants in February 1839, and duly registered on 7th of that month. The mortgage was obtained for the purpose of securing a debt due to B. F. from the mortgagors, and which had been previously secured in 1825 by the bond of D. who then held the mortgaged premises in trust for the mortgagors. Upon the death of D. the premises (which were chattel) were assigned to the *cestui que trusts* by his personal representatives. The priority of B. F. under her mortgage was disputed by certain simple contract creditors of the mortgagors, who having brought actions at law, had agreed that the proceedings in such actions should cease upon the terms contained in a consent, bearing date the 19th of January 1839, and which was made a rule of Court on the 2d of February following—namely, that they should be paid their respective demands, when proved, together with the costs, out of the produce to be realised by a sale of the mortgaged premi-

ses after payment of prior incumbrances. It appeared that the attorney acting for B. F. in procuring the execution of the mortgage to her, not only knew of the rights and had notice of the proceedings of the other creditors, but was in fact an active agent for the defendants (the mortgagors), in effectuating the arrangement whereby the other creditors had been induced to relinquish their proceedings at law upon the terms contained in the consent; *Held*, that such notice to B. F.'s attorney was sufficient to prevent her (although unaffected by *personal* notice) from gaining a priority by force of the registry of her mortgage deed over the other creditors who had acquired a prior equitable lien on the land by virtue of the consent; *Held also*, under the circumstance, that B. F. had no equitable right or claim (as against the consent creditors) to the mortgaged premises in respect of their having been the assets of D., the obligor in the bond of 1825. *Semble*, that under no circumstances, would B. F. have had such an equity; as it was competent for the representatives of D. upon his death to assign over to the *cestui que trusts* the trust premises, without their being in the first instance subject to the debt due to B. F.—Notice to an attorney or agent is not to be considered as implied or constructive notice merely, which is properly referable to something that a party or his agent ought, if reasonable diligence had been used on his behalf, to have acquired a knowledge of, but which possibly neither he nor his agent ever did know or acquire any knowledge of.—The general proposition that notice to an agent so as to affect his principal, must be in the same transaction, admits of certain qualifications. E. E. *Executors of Lenehan v. M' Cabe* 342

2. *Semble*, in the case of petitioners under the 5 & 6 W. 4, c. 55, the relative priority of several judgment creditors is to be ascertained by the date of the absolute order for the appointment or extension of the receiver, obtained by them respectively. *Egan v. Mulholland*

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See *Murtagh v. Tisdall*, 41 and *Baker v. Pettigru*

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PRIVILEGE FROM ARREST.

See ARREST.

RECEIVER.

See CONSENT,

I. *Appointment and Discharge generally.*

1. When upon a decree *pro confesso*, in a foreclosure suit, the plaintiff moves for a receiver, he must shew by affidavit the sum due for principal, interest and costs, after all just allowances, and that defendant is in possession; the statement in the bill as to the sum due, is not enough. R. *Rogers v. Newton* 40
2. Where it appeared that the receiver had passed his final account in 1829, when there was a small sum due to him; that the purchaser under the decree in the cause was put into possession the same year; and that the receiver had not received any of the rents since his last account; the Court granted an order to vacate the receiver's recognizance although the receiver had not been formally discharged.—The injunction to put the purchaser into possession, amounts to a discharge of the receiver. E. E. *Anonymous* 416
3. Where the deed reserving a fee-farm rent out of certain lands thereby conveyed in fee was of ancient date, and the rent after various *mesne* assignments was vested in the plaintiff as assignee, and was in arrear; and the estate conveyed by the deed, after various *mesne* assignments, was vested in the defendant as assignee:—upon a bill by the assignee of the rent, praying a receiver, &c., and the defendant's answer admitting the plaintiff's title, but insisting that his remedy was at law, the Court granted a receiver over the premises conveyed by the deed, to pay the arrears and future accruing gales of the rent, although the deed contained clauses of distress and re-entry in case of non-payment. R. *Stevell v. Murphy* 448

II. *Under 5 & 6 W. 4, c. 55.*

4. The Court will extend a receiver on a judgment, under the 5 & 6 W. 4, c. 55, over a trust term, unless it appear that the trustees are in possession; it is no cause against extending a receiver, that the judgment is only a collateral security, and that the petitioner has filed a charge in a

- Chancery suit on foot of the same demand. E. E. *White v. Blake* 111
- 5 Upon petition under the judgment act, a receiver being appointed, the Court on motion will entertain and decide a serious question of estate, viz., whether a respondent under a limitation in marriage articles, had an estate for life or an estate tail? R. *Brennan v. Fitzmaurice* 113
6. The affidavit of an agent will not be admitted to verify a petition under the Sheriffs' act, unless a strong case be made for dispensing with the oath of of the principal. C. *Lord Sligo v. O'Malley* 169
7. Upon an application for a receiver under the 5 & 6 W. 4, c. 55, over premises held under a lease, the tenant's interest in which had been evicted by ejectment for non-payment of rent, but the time for redemption had not expired; the Court will make an order for a receiver, the petitioner undertaking to pay the sum due to the landlord for debt and costs, and will not put the party to a redemption bill. E. E. *In re Executors of Hill v. Kerr* 410
8. A receiver under the Sheriffs' act will be directed to pay a sum of money in his hands to the petitioner, although he has not accounted, where it appears that the petitioner was the only creditor in Court. *In re ———* 412
9. A conditional order for a receiver will be discharged, if there be no verifying affidavit by the attorney as to the service of the conditional order. E. E. *In re Keogh v. Keogh* 412
10. On petition of a judgment creditor under the 1st section of 5 & 6 W. 4, c. 55, this Court will appoint a receiver over a term for years. *Semble*, in such case the relative priority of several judgment creditors is to be ascertained by the date of the absolute order for the appointment or extension of the receiver obtained by them respectively. *Egan v. Mulholland* 454

III. *Rights, Duties and Liabilities.*

11. A receiver appointed under the 1 & 2 V. c. 109, s. 30, to pay the tithe rent-charge, is bound to apply the sums received in the first instance, in discharge of the rent-charge and costs, and has

- nothing to do with the the payment of the head-rent to which the land may be liable. R. *Saunderson v. Stoney* 153
12. A receiver should not move that his balance may be invested, as such is not properly his motion. As the petitioner under the new rule (the 11th General Order, February 1839) may have had his balance invested, as of course, without applying to the Court, the costs of the motion will not be allowed, unless the applicant shews satisfactorily, why he had not the money invested under the rule. R. *Cooper v. Cooper* 155
13. A consent, the object of which is the allowance of a sum of money paid by a receiver on account of costs, will not be made a rule of Court, unless signed by the the parties themselves as well as by their attorneys. E. E. *In re Coleman v. Mason* 322
14. The Court will not vacate a receiver's recognizance at the same time he is discharged, even upon the consent of all the parties in the cause. E. E. *In re Fitzgerald v. Hill* 398
15. Where the Remembrancer has allocated a certain sum to be paid by a receiver as the tithe rent-charge due out of the lands over which he has been appointed; and his certificate has been served upon the receiver, and a personal demand made for the amount of such rent-charge, upon non-payment of same the party entitled will obtain an attachment against the receiver. E. E. *Brown v. Brown* 409

REDEMPTION.

See MORTGAGE, 5.

RELEASE.

See ANNUITY, 3.

RENT.

See MORTGAGE, 1.

REPLEVIN.

See ATTACHMENT, 3.

SALES JUDICIAL.

See TENANTS UNDER THE COURT.

1. An agreement to procure a sale of lands in the Master's office to a particular person, at a certain price, is a fraud on the Court, on the public, and on the credi-

tor. The Court itself, for the sake of the public, is bound to take notice of such an agreement, although the defendant falsely denies the existence of it, and sets up a fictitious case on his answer. *C. Hamilton v. Ball* 194, 195

II. Purchaser's Rights.

2. In sales under a decree, as in private sales, the plaintiff or vendor is not bound to furnish to the purchaser a fee for counsel, with the abstract of title, unless by special condition. If the purchaser require the opinion of counsel, he must take it at his own expense, but he will have only a qualified property in the opinion, until the sale is complete. *R. Alexander v. Crosbie* 141
3. Where the lands were sold under a decree upon the 30th of April 1840; one-fourth of the purchase-money deposited; a conditional order to confirm the sale, and subsequently the remaining three-fourths lodged in bank to the credit of the cause, all upon the following day, and the order to confirm the sale made absolute on the 12th of May; *Held*, that the purchaser was not entitled to the rents from the 1st of November, the gale-day next preceding the day of sale. *E. E. Vincent v. Thwaites* 426

III. Practice as to.

4. Biddings opened under the circumstances of the case, on an advance of £20 on £165, upon the application of a person who had bid at the former sale. — Whether the biddings will be opened or not is a question to be determined by the particular circumstances of each case. *E. E. Mayne v. Macartney* 324
5. Where it appeared that the receiver had passed his final account in 1829, when there was a small sum due to him; that the purchaser under the decree in the cause was put into possession the same year; and that the receiver had not received any of the rents since his last account; the Court granted an order to vacate the receiver's recognizance although the receiver had not been formally discharged. — The injunction to put the purchaser into possession amounts to a discharge of the receiver. *E. E. Anonymous* 416
6. A motion to invest the one-fourth of the purchase-money in $3\frac{1}{4}$ per cent. stock

must be upon notice. *E. E. Lee v. Poole* 419

7. In the Exchequer the three-fourths of the purchase-money cannot be paid in until the sale is confirmed. *Secus* in Chancery. *E. E. Vincent v. Thwaites* 427
8. Where an estate was set up for sale in two lots and one of them was sold, but no bidder appearing for the other the sale was adjourned as to it, the Court approved of the following condition of sale to the remaining lot:—That the purchaser should not require original searches for judgments against any person against whom such searches had been already made at the instance of the purchaser of the lot already sold, but should be satisfied with compared and certified copies of such searches. *R. Fitzgerald v. Lane* 447

SECURITY FOR COSTS.

See Costs.

SEQUESTRATION.

1. Notice of motion for liberty to execute a sequestration upon a decree is necessary, where it is sought to execute it against lands. *E. E. Welsh v. Welsh* 360
2. Upon an application for liberty to issue a sequestration for the costs of dismissing a bill, if the party be going against personal property, notice of the motion must not be given: *secus* where the party is going against real property. *E. E. O'Brien v. Foley* 418

SEQUESTRATORS.

- A motion on behalf of sequestrators, to lodge money, must be upon notice. *E. E. Byrne v. Langmore* 411

SERVICE.

See TAKING OFF THE FILE.

1. When a notice of a motion is personally served on a party out of Court, it should be, of a motion to be made on a particular day, and not on "the first opportunity." *R. Creed v. Creed* 32
2. Where the process-server pleaded guilty to an indictment for perjury, as to the service of process; *Held*, upon the special circumstances of the case, that the plaintiff and his attorney should pay to the defendant all costs incurred by them in setting aside the process,

except the costs of the prosecution of the process-server, over which the Court considered it had no control. Is the plaintiff in general liable for the costs of setting aside process against defendants who have succeeded in convicting the process-server of perjury? The affidavit of the process-server is conclusive as to the fact of service until a conviction for perjury takes place; *Sem- ble. E. E. Egan v. Doherty* 68

3. A defendant shewed as cause against an attachment for disobeying an injunction, that the affidavit of service was false, and having convicted the process-server of perjury, though contrary to the charge of the Judge; *Held*, that the defendant was entitled to all costs occasioned by the false affidavit, except the costs of the prosecution. *R. Cosgrave v. M'Donnell*, before Sir W. M'Mahon, 1835. 77 *note*

4. The mode of service required by the 1 & 2 V. c. 109, s. 30 (tithe rent-charge act), with respect to the ten days' notice of a party's intention to apply for a receiver under that act, is not applicable to the service of the order appointing such receiver, which must be served in the usual manner required by the justice of the Court for the service of its orders. *E. E. Mangan v. Massy* 106

5. Where the cause is out of Court, the notice of a motion to dismiss the bill for want of prosecution should be personally served upon the plaintiffs, and the defendant should come prepared with an affidavit of such personal service; but if the plaintiff appear upon the motion, he thereby waives the objection that he was not personally served with notice of the motion. *Grier v. Leahy* 227

6. Upon personal service of the defendant with the decree, directing him to pay a certain sum of money to the plaintiff, and on demand of payment by a third person, under a power of attorney, it is enough to shew the power of attorney to the defendant; and it is not necessary, in order to ground a motion for a sequestration for not paying the money pursuant to the decree, it should appear that at the time of the service of the decree, and of the demand, a copy of the power of attorney was left with the

defendant. *R. Vereker v. Lord Gort* 239

7. Service of the order for hearing. *E. E. Crosthwaite v. Murray* 323

SETTING DOWN.

See CAUSE, SETTING DOWN AND HEARING.

SOLICITOR AND CLIENT.

1. On bill filed by client against solicitor, to set aside a bond and judgment for the amount of an account stated and settled between the solicitor and client after the client had come of age, the solicitor having also acted as agent and manager of the estate of the client during his minority, the Court refused to open the account on the allegations that the greater portion of it consisted of charges for costs and other items for which the client was not properly liable, and that the costs were not taxed, and that it did not contain credits to a large amount, to which the client afterwards discovered he was entitled; *Held also*, that after a decretal order dismissing the bill as to opening the account stated and settled, and directing an account of subsequent dealings only, the Court will not on further directions go into an item overcharged and suppressed in the account stated and settled, no sufficient grounds for doing so having been shewn at the original hearing. *C. Darcy v. Burke* 1

2. A solicitor transacting business for his client and having at the same time a judgment against him bearing interest—the client having made general payments from time to time, the solicitor was held justified in applying those payments to his account for costs accruing due, although the interest on the judgment against his client was accumulating at the same time. *Ibid*

3. The Court has jurisdiction under a decree, binding the client to order his solicitor to bring in the deeds of his client in his possession, although he never appeared in the cause, and it is uncertain at what time the deeds came into his possession. *Sem- ble. R. Hargrave v. Holland* 137

4. As a general rule, from which there will be no deviation, unless under peculiar circumstances, the Court in computing the period of apprenticeship to an

attorney, will not allow credit for time elapsed before the payment of the stamp duty upon the indentures. *E. E. Ex parte Sterne* 378

STATUTE.

I am not bound to give to a section creating a flat statutable bar, (the statute of limitations) a stringent construction which does not necessarily follow from that section. *Per Lord PLUNKET, in Drought v. Jones* 307

STAYING PROCEEDINGS.

See ANSWER, 3.

Costs, 21, 22, 23, 24.

TAKING OF THE FILE.

Upon appeal from a decision in the Rolls, *Held*, that a special case must be made to sustain an application to take an affidavit off the file to prosecute for perjury. *C. N—— v. N——* 17

TENANTS UNDER THE COURT.

1. A lease under the Court for seven years *pending the cause*, being about to expire, the lands were sold under the decree, and the purchaser stated that he did not wish a new letting, but that the receiver should levy the accruing rents from the tenants, until the conveyance to him should be executed. After the expiration of the lease, the tenant continued to occupy, and the receiver to take the rent as before, but without any express agreement as to the new tenancy. Afterwards the purchaser, by injunction, took the actual possession, and turned the tenant out. On motion for a writ of restitution upon the ground that a tenancy from year to year had been created, and that the tenant was entitled to a notice to quit; *Held*, that as to the tenancy under the Court, the cause is determined by the execution of the conveyance to the purchaser, and that the tenant overholding, without special agreement, held impliedly subject to the condition of the lease, and therefore his tenancy was determined by the execution of the conveyance to the purchaser. *R. Johnson v. Reardon* 123
2. Upon a letting under the Court, the person declared the highest bidder will not be discharged from his bidding, though it was at great overvalue, and

was by an agent who appeared to have misapprehended the intention of his instructions; but the lands may be set up again, upon the bidder undertaking to pay all costs occasioned by a reletting, and to enter into security by recognizance for payment yearly, during the term, of a sum to be settled by the Master, as compensation for the loss, by any difference between the rent already bid, and the rent to be obtained upon the reletting. Where the bidding was £261 per annum, and was excessive, the Court ordered upon consent, that the bidder be deemed tenant at £200, and that he should take out leases at that rent, &c. *R. Coote v. Coote* 159 And see *Cox v. Cox, note. Ibid.* 160

TITHES.

1. In a suit for the arrears of tithe composition in the name of the sequestrator of a parish, there is no substantial reason why the Bishop of the diocese should be made a party. *E. E. Egan v. Doherty* 68
2. Where lands were apportioned with tithe composition for two parishes, the Court upon a petition presented under the 1 & 2 V. 109, s. 16, referred it to the Remembrancer to inquire and report in which of the parishes the lands were situated, and whether they were doubly charged with the rent-charge; and if so, for which of said parishes they had been rightfully charged with tithe composition. *E. E. Armstrong v. Pepper* 89
3. The mode of service required by the 1 & 2 Vict. c. 109, s. 30 (tithe rent-charge act), with respect to the ten days' notice of a party's intention to apply for a receiver under that act, is not applicable to the service of the order appointing such receiver, which must be served in the usual manner required by the justice of the Court for the service of its order. *E. E. Mangan v. Massey* 106
4. A receiver appointed under the 1 & 2 Vict. c. 109, s. 30, to pay the tithe rent-charge, is bound to apply the sums received in the first instance in discharge of the rent-charge and costs, and has nothing to do with the payment of the head-rent to which the land may be liable. *R. Sanderson v. Stoney* 153

5. Where the Remembrancer has allocated a certain sum to be paid by a receiver as the tithe rent-charge due out of the lands over which he has been appointed; and his certificate has been served upon the receiver, and a personal demand made for the amount of such rent-charge, upon non-payment of same the party entitled will obtain an attachment against the receiver. The general order of the Court, directing the receiver to pay the tithe rent-charge, amounts to an order to pay in each particular case. *E. E. Brown v. Brown* 409

TRUSTS AND TRUSTEES.

1. The Court will extend a receiver on a judgment, under the 5 & 6 W. 4, c. 55, over a trust term, unless it appear that the trustees are in possession; it is no cause, in extending a receiver, that the judgment is only a collateral security, and that the petitioner has filed a charge in a Chancery suit on foot of the same demand. *E. E. White v. Blake* 111
2. An executor who joins in taking out probate, but does not act, is liable for the acts of his co-executor, and chargeable for monies lost by the wilful default of such co-executor. Where a person is clothed with the character of trustee, the *cestui que trusts* shall not be affected by his acts, except so far as they knew and acquiesced. *C. Scully v. Delany* 165
3. Where A. was nominated trustee and executor of a will, upon a petition presented for his removal under 1 W. 4, c. 60, s. 22, stating that the will had been produced and shewn to A., and read by him previously to its having been executed by the testator in his lifetime; and that A. had thereupon approved thereof and consented to act as such trustee, but that subsequently to the testator's death he had declined to interfere in the trusts of the will, the Court made an order for his removal, and referred it to the Remembrancer to approve of a proper person to be appointed trustee in his place. *E. E. Crook v. Ingoldsby* 375
4. A creditor coming in under a decree cannot rely upon a will as creating a trust in his favor, unless it have been

put sufficiently in issue for that purpose either by the pleadings in the cause or by the charge or discharge in the office. *E. E. O'Kelly v. Bodkin* 361

WASTE.

1. A bill to restrain waste, the damage proved being only £7. 16s. is beneath the dignity of the Court, and will be dismissed with costs at the hearing. *C. Lambert v. Lambert* 210
2. Where a bill by the person next in remainder charged that the tenant for life, who was dispunishable of waste, and who had power to make leases not dispunishable of waste, had demised a part of the lands to a third person, and that such person, in collusion with the tenant for life was committing waste by turning up, tilling, and burning the land; and the defendant admitted the turning up, &c., but stated it was land which the tenant for life had reclaimed and laid down in grass thirty years before, the Court refused to grant a motion for an injunction. *Semble*—That such a pasture is not ancient meadow. *E. E. Davies v. Davies* 414

WILLS.

1. Devise to "children, share and share alike"—a first codicil appointed a guardian "during minority"—second codicil, "in the event of the death of any of the children, their portion to be divided among the survivors, share and share alike;" *Held*, that "in the event of the death," meant death during minority. In a will, "in the event of the death of the devisee." are never construed to mean the event of a lapse by death before the testator, except from necessity. *C. Montgomery v. Montgomery* 161
2. Testator having a power to appoint by deed or will, executed a will, and afterwards a deed, and then a codicil to his will. By his will he appointed four denominations of land to his four sons, giving one denomination to each and his heirs "to go to them immediately after the death of his wife; and in case of the death of any or either of his said younger sons before he or they should be respectively entitled thereto, then the part or share of him or them so dying to go to and be divided

"amongst the survivors equally, share "and share alike." By the deed he partly displaced the appointment contained in his will, and appointed to his third son and his heirs the denomination of land given by his will to his fourth son, leaving the latter without provision—then, by a codicil he appointed to his fourth son and his heirs another denomination of land "instead of" that given by his will; *Held*, that the words "and in case of the death of any or "either of his said younger sons," &c., referred to the event of the death, not of the testator, but of his wife; *Held also*, that although the appointment by the will would have been subject to the clause of survivorship, the appointment by the codicil was absolute to him and his heirs. *C. Commissioners of Charitable Donations v. Cotter* 196

3. A. upon the marriage of his daughter B. in 1794 granted to trustees an annuity of £100 out of part of the lands of C. in trust for her husband for life, and after his death for B. for her life in case she should survive her husband, and after death of the survivor for the children of the marriage, in such shares as the parents, &c. In January 1813 A. made his will, and after minutely specifying the property of which he was possessed, the head rents and profit rents of each, he devised all these to trustees "to, "for, and upon the several trusts and purposes hereinafter mentioned and none "other;" and "after payment of the head rents payable thereout" to apply same to the trusts thereafter mentioned; he then directed them to pay £100 a-year to his wife, and subject thereto, he gave to B. an annuity of £50 a-year for her life, and upon the decease of his wife a further annuity to her of £50 a-year, "said two annuities to B. "for her sole and separate use, free "from the control of her said husband;" and subject to the "head rents," and "to these two annuities to his wife and "daughter," he disposed of the rest of his property, without making any allusion to the charge upon it under the deed of 1794. He died leaving B. and her husband surviving; the latter having died, and a party who became en-

titled to some of the lands charged with these two annuities having refused to continue to pay both, she filed a bill to raise the arrears; *Held*, that she was bound to elect. *E. E. Graham v. Thynne* 402

4. Where a testator devised to trustees his "estate and interest" in farms of which he was seized for lives renewable for ever, in trust, after paying certain annuities, &c. to permit and suffer his nephew A. to enjoy the same for his life; and from and after his decease, to permit such son of his as should attain the age of twenty-one to enjoy said lands, and on failure of such remainder to his nephew B., for his life, remainder to his first son as before: *Held*, that a son of A.'s who attained the age of twenty-one, and died in the lifetime of his father, took the absolute interest in these premises. *E. E. Kirby v. O'Ha* 424

WORDS.

See WILL.

WRIT.

1. To warrant a party in issuing a writ of replevin, he should have been in clear and unequivocal possession of the thing replevied, at the time of the alleged taking. Where he issues the writ under improper circumstances, he will be attached for his contempt—the writ will be quashed, and the goods ordered to be restored. *C. Comerford v. Blake* 176
2. Where the sheriff returned *nihil* on two several writs of *scire facias* issued on a recognizance, entered into by parties who resided abroad, and directed to the sheriff of the county where the estate of the party lay; rules to plead may be entered as on a return of *scire feci*. *C. The Queen v. Barry* 189
3. On motion (after bill filed praying an account, &c.) by judgment creditor for a writ *ne exeat regno*, to prevent the defendant, who was administrator of the consorsor, and threatened to leave the kingdom, from so doing,—the Court refused the writ, inasmuch as the debt was a legal debt, and the plaintiff's affidavit was not positive that assets had been received by the defendant. *R. Hill v. O'Hanlon* 463

